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1991]

THE FIRST AMENDMENT AND MEDIA RIGHTS DURING WARTIME: SOME THOUGHTS AFTER OPERATION DESERT STORM*

MARK C. RAHDERT**

I. INTRODUCTION

ESPECIALLY in its bicentennial year, it is alluring to think that the rights guaranteed by the Bill of Rights are simple, direct and clear. That is, I think, the general perception of the American public, a perception fed by decades of "benign neglect" of the subject of civil liberties in American public education. Two centuries of generally stable, prosperous, democratic government under a single constitution have permitted us to grow so accustomed to our civil liberties that we largely take them for granted. Our governments—national, state and local—habitually respect our rights and, for the most part, resist temptations to take them away. Our courts energetically defend those rights, enforcing them on those few occasions when governments do overstep the bounds of freedom delineated by the Bill of Rights.¹

The rights themselves have become familiar with long enjoyment. We know, as citizens of the United States, that we have these rights; we do not fear that they will be taken away. Consequently, we rarely think about these rights guaranteed to us.²

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1. We, as lawyers, tend to focus on the exceptional occasions where a government oversteps the bounds of permissible regulation and where, therefore, the courts must block that government action in order to protect civil liberties, despite, in some cases, strong public sentiment in favor of the curtailment of protected rights. Among the more prominent recent examples of court-mandated protection of first amendment rights are the flag-burning cases, where the Supreme Court invalidated state and federal attempts to punish symbolic destruction of the American flag. *See* *United States v. Eichman*, 110 S. Ct. 2404 (1990) (United States may not punish symbolic flag-burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (states may not punish symbolic flag-burning). These examples appear to be, however, the exception rather than the rule. Judicial intervention in this area is generally unnecessary because of the self-regulation of the legislative and executive branches.

2. A 1989 study conducted by Michael X. Delli Carpini, assistant professor

(1513)

Such complacency breeds a public perception that the rights themselves are so clear and so essential that no one could rationally imagine their withdrawal.

A casual glance at the Bill of Rights seems to reinforce the popular notion of clarity and simplicity. The language is generally broad, majestic and apparently clear. The Bill of Rights has been in existence in its pristine form, without change or qualification for 200 years.³ If ever legal commands were pure, simple, and easy to follow, these declarations of rights in the first ten amendments to the Constitution certainly seem to fill that bill. As any scholar of constitutional law knows, however, behind the

of political science at Barnard College, and Scott Keeter, assistant professor of political science at Virginia Commonwealth University, found that only 46% of a cross-section of American adults polled by telephone knew that the first ten amendments to the Constitution are collectively called the Bill of Rights. Kagay, *Public's Knowledge of Civics Rises Only a Bit*, N.Y. Times, May 28, 1989, at L30, col. 1, L31, col. 1. Even more disturbing, perhaps, is a 1987 Hearst poll which disclosed that "nearly half of Americans believe that the Constitution contains the Marxist slogan: 'From each according to his ability, to each according to his need.'" *Id.* Additionally, approximately 64% of those polled "believed the framers made English the national language." *Id.*

This apathy for the Constitution, however, is not unique to our generation. A Gallup poll in 1947 revealed that 41% of those Americans questioned could not correctly answer the question: "What is the Bill of Rights?" *Id.*

3. There have been recent rumblings about a constitutional amendment to withdraw first amendment protection for flag burning. In response to the Supreme Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1990), which held that a state could not punish a protestor who burned the American flag because flag burning is constitutionally protected speech, Congress drafted The Flag Protection Act of 1989, 18 U.S.C. § 700 (Supp. II 1990) (criminalizing desecration of American flag). The Court, however, held this statute unconstitutional as applied to protestors who burned the flag as well. *United States v. Eichman*, 110 S. Ct. 2404 (1990). In this decision, the Court relied heavily upon its reasoning in *Texas v. Johnson*. *Id.* at 2407-10 (reasoning that Flag Protection Act, like Texas statute at issue in *Johnson*, "suppresses expression out of concern for its likely communicative impact," and therefore must be subjected to "most exacting scrutiny").

During the drafting of The Flag Protection Act, some members of Congress, including Senators Thurmond, Hatch and Grassley, were of the opinion that the "most sound and prudent course to protect the integrity of the American flag" was by constitutional amendment. S. REP. NO. 152, 101st Cong., 1st Sess. 18, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 610, 626 (additional views of Senator Strom Thurmond). They argued—in retrospect, correctly—that it was "futile to try to overturn [the] Supreme Court interpretation of the Constitution by a statute." *Id.* at 24, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS at 630 (minority views of Senators Hatch and Grassley). Instead, with the President's backing, they offered a new constitutional amendment which would provide that "[t]he Congress shall have the power to prohibit the physical desecration of the Flag of the United States." *Id.* at 27, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS at 634. The majority of the Congress, however, chose to adopt the statutory approach and the proposed amendment never came to a vote.

facade of apparent simplicity lies a maze of complex legal dilemmas.

Each provision of the Bill of Rights only vaguely defines the contours of a legal battleground, on which, for 200 years, the battles of our fundamental freedoms have been fought. Chief Justice John Marshall remarked 172 years ago that the nature of a constitutional provision "requires[] that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."⁴ He was speaking of the powers of government enumerated in the body of the Constitution, but his statement applies just as forcefully to the privileges enumerated in the Bill of Rights. This deliberate focus by the Framers on broad outlines necessarily means that much will be left to judicial interpretation. In the oft-quoted language of *Monaco v. Mississippi*:⁵ "Behind the words of the constitutional provisions are postulates that limit and control."⁶ Thus, judicial weighing of these (often competing) "postulates" at different times in our nation's history and in response to the endless variations of human experience will cause the words of a particular constitutional guarantee to take on different meanings and bear different significance.

There could be no more pertinent reminder of these jurisprudential truisms than the constitutional jousting we recently witnessed between the media and the press on the one hand, and the military on the other, during "Operation Desert Storm," the war between the allied nations and Iraq over the liberation of Kuwait.⁷ On the deserts adjacent to the Persian Gulf, the government that led the engagement with the Iraqi army over the borders of Iraq and Kuwait also fought some vigorous skirmishes with the media over the outer limits of free speech and freedom of the press. On this latter battleground, there were no decisive battles. The ultimate cease-fire was more a standoff than a victory

4. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (holding that not all powers delegated to government through Constitution must be by express delegation; powers may be implied).

5. 292 U.S. 313 (1934) (holding that article III of the Constitution and the eleventh amendment impliedly bar Court from exercising jurisdiction over suit brought by foreign state against state of union, unless state consents to be sued).

6. *Id.* at 322.

7. The chronicles of this military episode are yet to be written. For a reasonably accurate summary of events, see Duffy, *The One Hundred Hour War*, U.S. NEWS AND WORLD REPORT, Mar. 11, 1991, at 11. For information on the covert military activities during this war, see Matthews, *The Secret History of the War*, NEWSWEEK, Mar. 18, 1991, at 28; Waller, *Secret Warriors*, NEWSWEEK, Jun. 17, 1991, at 20.

for either side. There were, however, portents of a coming showdown to which both sides will send all their troops and go for broke.⁸ The purpose of this Article is to muse about the relevant issues before the next battle cries are sounded.

The first amendment provides, in terms that seem to admit no uncertainty, that "Congress shall make no law . . . abridging the freedom of speech, or of the press"⁹ As Justice Hugo Black repeatedly observed, these words seem to convey, in unmistakable terms, that our national government is expressly forbidden from doing anything that would interfere with freedom of speech.¹⁰ Yet, as Justice Oliver Wendell Holmes, Jr. wrote for the Court during World War I: "When a nation is at war many things that might be said in time of peace are such a hindrance to [the war] effort that their utterance will not be endured so long as men fight"¹¹ Thus, the Supreme Court has been forced to recognize that the apparently unbending language of the first amend-

8. *See, e.g.*, *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991) (members of press brought action challenging Defense Department regulations governing coverage of U.S. armed forces activities overseas during periods of hostilities; court held that claims for injunctive relief were mooted by conclusion of Persian Gulf war and lifting of some regulations).

9. U.S. CONST. amend. I.

10. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The Government's power to censor the press was abolished [by the First Amendment] so that the press would remain forever free to censure the Government."); *New York Times v. Sullivan*, 376 U.S. 254, 293 (1963) (Black, J., concurring) ("The requirement that malice be proved provides at best an evanescent protection for the right to critically discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."); *Speiser v. Randall*, 357 U.S. 513, 530 (1958) (Black, J., concurring) ("We should never forget that the freedoms secured by that amendment—Speech, Press, Religion, Petition and Assembly—are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry"); *Beauharnais v. United States*, 343 U.S. 250, 267 (1951) (Black, J., dissenting) ("[N]o legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss."); *Dennis v. United States*, 341 U.S. 494, 579 (1950) (Black, J., dissenting) ("So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'"); *American Communication Ass'n v. Douds*, 339 U.S. 382, 445 (1950) (Black, J., dissenting) ("[T]he First Amendment was added after adoption of the Constitution for the express purpose of barring Congress from using previously granted powers to abridge belief or expression."); *Bridges v. California*, 314 U.S. 252, 263 (1941) (Black, J. delivered opinion of Court) ("[T]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.'").

11. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that prosecution under federal espionage act did not violate defendant's first amendment rights where defendant had conspired to distribute 15,000 anti-war circulars to draftees).

ment must be softened during periods of armed conflict in order to strike a balance between the claims of free speech and the needs of national security.¹²

Inevitably, the Court has conceded that the realities of war necessitate some limitations on the freedom of speech.¹³ The

12. See generally Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 438-40 (1980) (discussing relative merits of balancing approach to first amendment jurisprudence); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 935 (1963) [hereinafter Emerson, *General Theory*] (discussing difficulties inherent in balancing society's interest in freedom of expression against military's interest in conducting effective operations).

13. The seminal case which gave weight to the military's point of view was *Near v. Minnesota*, 283 U.S. 697 (1931). In dictum, the Court stated that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.* at 716. The *Near* Court paved the way for later decisions which held that national security or military interests could be the basis for an infringement on the first amendment. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968) (punishing burning of draft card did not infringe upon first amendment rights because "substantial governmental interest" in "smooth and efficient functioning of the Selective Service System" was sufficient to allow restriction on "noncommunicative" actions); *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("[T]he different character of the military community and of the military mission requires a different application of those protections [of the First Amendment]."); *United States v. Albertini*, 472 U.S. 675, 687-88 (1985) (rule barring petitioner from a military base to protest war upheld).

The Court has not always, however, deferred to an expressed executive branch interest in national security. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1970) (per curiam decision) (denying government request based on grounds of national security for injunctions prohibiting publication of classified documents on government policy and strategy during Vietnam war). Nor has Congress.

The Court, in *New York Times*, held that the Washington Post and New York Times could not be prohibited from publishing certain classified material, but the Court was divided as to the scope of its holding. The justices' main point of disagreement concerned whether, under any circumstances, the Court may enjoin the publication of news to preserve national security. A minority of the justices argued that any governmental attempt to enjoin the publication of news is per se unconstitutional under the first amendment. *Id.* at 715 (Black, J., concurring) (permitting publication of news to be enjoined "would make a shambles of the First Amendment"); *id.* at 720 (Douglas, J., concurring) (first amendment clearly prohibits Congress from imposing restraint on press and it is not necessary to decide "what leveling effect the war power of Congress might have"). In contrast, a majority of the Court left open the possibility that the publication of news may be enjoined in certain circumstances. *Id.* at 725-26 (Brennan, J., concurring) (while "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden," first amendment does not tolerate "prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result"); *id.* at 729-30 (Stewart, J., concurring) ("it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense"); *id.* at 731 (White, J., concurring) ("I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.").

question is: how much limitation? For the most part, the Court studiously has avoided proffering any firm answer. When and if the Court is forced to do so, finding that answer will be by no means easy.

Intertwined with the ultimate question of limitation on freedom of speech during times of war are two independent but inter-related questions that always arise during wartime: (1) to what extent can our military commanders, by censorship or otherwise, prevent the press from publishing information in its possession that the military officials deem threatening to our national security; and (2) to what extent can military commanders control access by the press to information on or observation of military maneuvers? On both these questions there is much debate and more than a little history. There is, however, surprisingly little law. This Article will address each of these questions in turn, with specific reference to the recent events in the Persian Gulf, events which illustrate the inherent conflicts between expediency and doctrine posed by these questions.

II. MILITARY CENSORSHIP OF THE PRESS

One must begin consideration of military censorship of the press with the recognition that, in general, there is no more serious threat to freedom of speech than government censorship.¹⁴

Justice Douglas, in his opinion, did point out that Congress, when drafting the Espionage Act of 1950, specifically rejected a version of the bill which gave the President the authority to "declare the existence of [a national emergency] and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy." *Id.* at 721-22 (quoting 55 CONG. REC. 1763 (1917)). Thus, despite the lack of consensus suggested by the multiple opinions in *New York Times*, and the growing body of case law favorable to the military, there is continuing Congressional support for freedom of the press in the area of national security, even though the material published might bring harm to this country. By refusing to give the President an explicit emergency power of prior restraint, Congress arguably exercised a preference for subsequent punishment over prior restraints, and thus left the press free to follow its own sensibilities and instincts in the first instance in determining what might harm national security. Senator Ashurst put it succinctly when he said that "freedom of the press means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason." 55 CONG. REC. 2005 (1917) (cited in *New York Times*, 403 U.S. at 734 n.4). This congressional attitude toward conflicts between the interests of a free press and the interests of national security should continue to influence future judicial decisions in this area, as it did in *New York Times*.

14. The Supreme Court has stated that all statutes which entail censorship "come[] to this Court bearing a heavy presumption against [their] constitutional

The first amendment arose in part from the Framers' resentment of the efforts of colonial governments to suppress and punish speech critical of the policies of the Crown before the American Revolution.¹⁵ As commentators from Thomas Jefferson¹⁶ to Thomas Emerson¹⁷ have observed, one of the central tenets of the first amendment is that it operates to immunize from governmental interference speech that criticizes the policies and conduct of government. This serves to facilitate the "robust and wide-open debate"¹⁸ on public issues that is essential to democratic governance.

validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (holding that state resolution vesting commission with power to "encourage morality in youth" by imposing system of "informal censorship" was unconstitutional prior restraint on speech).

15. Maryland, for example, had an especially harsh law against open political debate—"Punish[ing] all Speeches, Practices and Attempts relating to his Lordship and Government, that shall be thought mutinous and Seditious." *NARRATIVES OF THE INSURRECTIONS, 1675-1690*, at 309 (C. Andrews ed. 1915). This law, held by commentators to be "against all Sense, Equity, Reason, and Law," permitted punishments which included "Whipping, Branding, Boreing [sic] through the Tongue, Fine, Imprisonment, Banishment, or Death." *Id.* For a fuller detailing of the methods of and reasons for application of the laws of Seditious Libel, see L. LEVY, *EMERGENCE OF A FREE PRESS* 16-61 (1985).

16. "The basis of our governments [sic] being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." Letter from Thomas Jefferson to Col. Edward Carrington (Jan. 16, 1757), in 2 *THE WRITINGS OF THOMAS JEFFERSON*, 359-60 (P. Ford ed. 1894).

17. Professor Emerson wrote:

It is through the political process that most of the immediate decisions on the survival, welfare and progress of a society are made. It is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. Freedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere. . . . In general, the greater the degree of political discussion allowed, the more responsive is the government, the closer is it brought to the will of its people, and the harder must it strive to be worthy of their support.

The crucial point, however, is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government.

Emerson, *General Theory*, *supra* note 12, at 893.

For other writings evaluating and analyzing the theoretical underpinnings of the First Amendment, see T. EMERSON, *THE SYSTEM OF FREE EXPRESSION* (1970); F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299 (1978); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 *SUP. CT. REV.* 191; Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204 (1972).

18. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Allowing censorship threatens that tenet because it allows the government, on the pretext of protecting the public interest, to "sanitize" the public forum of information or ideas that would call into question national policies. The government thus manipulates public opinion and ultimately controls the outcome of public debate. A government which has that power is one which is largely immune from public accountability.¹⁹ One of the "easy" verities about the Bill of Rights, therefore, is that the first amendment prevents the government from using censorship or other "prior restraints" to control the flow of information to the people.²⁰ How true, however, is this in reality?

19. Taken to its logical extreme, governmental prior restraint puts the government's actions "beyond public scrutiny [by] provid[ing] its own blanket of concealment. The government needs to offer no public justification for imposing secrecy; the justification itself is secret." Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161, 168 (1981). Other commentators agree. Emerson, for example, has stated that the public, as sovereign, must have all information available in order to instruct its servants, the government. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 4. Emerson proposes that there can be no holding back of information; otherwise, ultimate decision-making by the people, to whom the function is committed, becomes impossible. *Id.* For further discussion of the vital role of information in a democracy, see Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983); Emerson, *General Theory*, *supra* note 12, at 882-83.

Not all commentators share this view. BeVier disagrees because it envisions a "town meeting" type of direct democracy, a system neither set up by the Constitution nor the way in which modern governmental institutions function. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 505-06 (1980). Rather, according to BeVier, the Constitution gives us a representative democracy, and it is our representatives, not the people, who must have access to the information. *Id.* BeVier's view, however, overlooks the public need for the same information in order to make informed judgments about the election of political representatives, as well as the capacity of informed citizens to influence congressional decisions through a variety of channels such as directly writing to members of Congress, contributing to their campaigns or the campaigns of their opponents, participating in public opinion polls that so often guide our leaders, or participating in public demonstrations.

20. The Court embraced the principle of freedom to publish without prior restraints in *Near v. Minnesota*, 283 U.S. 697 (1931). The *Near* Court held that a statute which allowed a judge to enjoin publication of a newspaper unless a publisher who allegedly distributed scandalous material could prove that the matter published was true and published with good motives was censorship. *Id.* at 713. The Court specifically noted that "the chief purpose of the guaranty [of liberty of the press was] to prevent previous restraints on publications." *Id.* Since then, the Supreme Court has extended this protection to other means of expression. See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (pamphlets); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picket signs); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (magazines); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970) (newspapers); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial advertisements).

During the Cold War, it was popular in high school civics lessons to reinforce the idea that our Constitution protects freedom of speech and the press by contrasting our free press with the "propaganda machines" of our totalitarian enemies, particularly those within the so-called Soviet Bloc. Primary and secondary school teachers charged with the important task of inculcating basic American values taught that we, because our press was free, were guaranteed that what we read in the newspapers or heard on television about public events was reasonably accurate. In contrast, we were told, citizens in totalitarian nations were told only what the government wanted them to hear, and that information was often deliberate falsehood.²¹

If one wanted to fashion such a civics lesson today, the conflict in Iraq would appear to supply a classic "textbook" example of this contrast between our freedoms and totalitarian practice. Because of the independence of our press and the freedom of speech we all enjoy, we believe that we in America were told the truth about the fortunes of Operation Desert Storm.²² We believe that when our press reported stunning victories for the Coalition with unbelievably light casualties, this was real fact, not some propagandist ploy.²³ In utter contrast, the people of Iraq,

21. This Cold War civics lesson is still very much at large. See, e.g., A. KOWNSLAR & T. SMART, *CIVICS, CITIZENS AND SOCIETY* 313-14 (2d ed. 1983); S. SCHWARTZ & J. O'CONNOR, *EXPLORING OUR NATION'S HISTORY* 565-66 (1974); see also Brown, *Untruth*, *THE NEW REPUBLIC*, Apr. 1, 1991, at 16 (commenting that even today Soviet evening news broadcast is "simply an organ of the state apparatus").

22. For a look at the use of the media by both sides during the Gulf War, see Alter, *The Propaganda of War*, *NEWSWEEK*, Feb. 25, 1991, at 38 (suggesting that politicians and military officers utilized media to engender domestic support for Gulf War); Morrow, *The Fog of War*, *TIME*, Feb. 4, 1991, at 16 (illustrating difficulties inherent in distinguishing fact from propaganda during Gulf War).

23. Published reports on the lopsidedness of the damage sustained by both sides are truly remarkable. The Iraqis had an estimated 100,000 troops killed, captured or deserted, compared to the Coalition's 184 killed, 238 wounded, 81 missing, and 13 POW's; Iraq's hardware loss (destroyed or damaged) totalled 4,000 tanks, 2,140 artillery pieces, 1,856 armored personnel carriers ("APC"), 7 helicopters, 103 aircraft (with an additional 139 being held in Iran), and 83 ships. The Coalition's hardware loss only amounted to 4 tanks, 1 artillery piece, 9 APCs, 17 helicopters (an additional 11 were lost to non-combat accidents), 44 aircraft (an additional 10 were lost to non-combat accidents), and 2 ships. Duffy, *The One Hundred Hour War*, *U.S. NEWS AND WORLD REPORT*, Mar. 11, 1991 at 11.

During the fighting, press briefings and news reports were full of positive accounts of our swift and precise success. Night after night we were shown videotape of our "smart" bombs going down chimney stacks to blow up the exact target chosen. What we were not told about, however, is that "smart" bombs made up only 7% of all the U.S. explosives dropped on Iran and Iraq and that 70% of the 88,500 tons of bombs dropped missed their targets. See Wicker, *An Unknown Casualty*, *N.Y. Times*, Mar. 20, 1991, at A29, col. 5.

we believe, were (at least during the course of the conflict) deliberately misled by the calculated falsehoods of a government-controlled media. Even as Iraqi forces were being subjected to a crushing military rout unprecedented in modern warfare,²⁴ their government-controlled press and media were publishing false accounts of great Iraqi victories and stunning Coalition losses. What better evidence could one imagine for the proposition that the road of censorship leads inevitably to lies and deception? What better proof that prior restraints are the antithesis of democratic freedom?

But not so fast. *Our* press was *also* subjected to military censorship.²⁵ Television reports came back from the Persian Gulf

Even though the networks generally had the capability for live coverage of the fighting, the closest the American public ever got to experiencing this war first-hand without military intervention was to see reporters on rooftops while SCUD and Patriot missiles flew in the background. All other reports came back only after having been processed by the Joint Information Bureau of the Military (JIB).

One of the more surprising facts about this war, even with its heavy censorship, is the public's belief that they were getting enough information about the war. A Time/CNN poll conducted in January revealed that 79% of the adults surveyed were satisfied with the news they were receiving, and 88% supported some censorship of the media. Zoglin, *Volleys on the Information Front*, TIME, Feb. 4, 1991, at 45. In short, we took this war on faith: on our faith in the government to do the right thing; on our faith in the press to serve as our watchdog over the government; and on our underlying faith in the essential accuracy of the information we received from both press and government sources. For specific examples of the military censorship in the Gulf war, see *infra* notes 25-27 and accompanying text.

24. British Commander General Peter de la Billiere was quoted in a Newsweek article as saying "We are, today, at the end of perhaps one of the greatest victories we have ever experienced." Barry, *A Textbook Victory*, NEWSWEEK, Mar. 11, 1991, at 38. That article went on to say that "[t]he rout of Iraq has few historical precedents," comparing it to other historical routs such as Agincourt, Plassey, and Omdurman. *Id.*

25. For the full content of the military guidelines regarding reporters' movements and censorship, see *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1575-82 (S.D.N.Y. 1991). The appendices included with the opinion contain the ground rules and regulations issued after the initiation of hostilities, as well as all subsequent changes issued. *Id.* Appendices A to C contain various *Guidelines for News Media*; appendix D contains the *Centcom Pool Membership and Operating Procedures*; and appendix E contains the *Operation Desert Shield Ground Rules*. *Id.*

In theory, reports were to be censored only for information which could harm troop security. Pentagon spokesman Pete Williams said: "It would not be legitimate for us to object to something because it's embarrassing to us or is critical of us." Sheridan, *Press, Politicians Weigh Coverage Restrictions*, BROADCASTING, Feb. 25, 1991, at 52. The reality was apparently quite different. Some examples of what, in Mr. Williams' terms, would have seemed to be "illegitimate" censorship include deletion of an Associated Press reporter's reference to Navy pilots watching pornographic films before a mission, editing tapes of bombing runs by removing the audio portions that revealed the "raw sounds of 'guys in

with subtitles saying "cleared by American military officials" or words to that effect. If the accounts of some news reporters are to be credited, while pictures and reports detailing Coalition power and success were cleared for release, efforts to show aspects of Coalition vulnerability were thwarted by military intervention.²⁶

combat," and prohibition by the military of making public a video of Apache helicopter attacks on Iraqi positions. DeParle, *Keeping the News in Step: Are the Pentagon Gulf War Rules Here to Stay?*, N.Y. Times, May 6, 1991, at A9, col. 1 (quoting Defense Secretary Cheney, who stated that he did not regard TV tapes as a press release); *The Bombs Never Missed*, N.Y. Times, May 6, 1991, at A9, col. 3. In this last instance, several unescorted reporters arriving at a forward unit got an unauthorized viewing of a tape which, according to John Balzar, showed Iraqi soldiers "as big as football players on the TV screen." Balzar described the video scene: "A guy was hit and you could see him drop and he struggled up. They fired again and the body next to him exploded." *The Bombs Never Missed*, *supra*, at A9, col. 3. After Balzar reported on viewing this tape, he was barred from visiting any other Apache units, and requests by other reporters to see this tape were denied. *Id.*

Other examples of "illegitimate" censorship that took place include the explicit banning of the coverage of flag-draped coffins at Dover Air Force Base and changing the description of the pilots returning from a bombing mission. Alter, *Showdown at "Fact Gap"*, NEWSWEEK, Feb. 4, 1991, at 61. Where a reporter described the pilots as "giddy," the censors wanted to change the word to "proud." *Id.* They compromised with "pumped up." *Id.*

26. As far as the viewing public is concerned, this was a relatively bloodless war. With the exception of what CNN was allowed to broadcast from inside Iraq (and even then broadcasts were under the censorship of the Iraqi government), the American public received little or no information on the true extent of the damage wrought by the war, nor any reliable information on the numbers of civilian or military casualties. See Wicker, *supra* note 23 (even five months after the end of hostilities, the number of dead Iraqi soldiers and civilians is still in dispute).

"The history of this war is probably going to be lost," said CBS News correspondent Richard Threlkeld at a panel at Fordham University. Brown, *Censorship Leaves Incomplete Picture of War*, BROADCASTING, Apr. 8, 1991, at 71. Between delays ranging from one day to one week, and "security review," the press lost control over their pieces, and "no accounts of the relatively few combat engagements of the war . . . reached here until the military either wanted them to, or the system got around to moving them." Getler, *View From the Newsroom*, Washington Post, Mar. 17, 1991, at D1, col. 1, D4, col. 2. The few accounts of death that did reach home were delayed, fuzzy, fast notes about the deaths resulting from friendly fire. *Id.*

Even the military admitted that battle footage was scarce. Captain Mike Sherman of the Navy, who ran the JIB in Dharhan, Saudi Arabia until December, commented: "I didn't see the images I thought I was going to see. I haven't seen a tank battle yet, have you? Why there weren't any video teams there is beyond me." *The Bombs Never Missed*, *supra* note 25, at A9, col. 3.

One probable explanation for this scarcity of footage is the military's method of censoring the reporters through "access and delay." For example, six days into the air war, Judd Rose, a correspondent for ABC News, was part of a pool pressing for interviews with pilots. DeParle, *supra* note 25, at A9, col. 1. Instead, the press pool was taken to the motor pool because their commander complained that these "unsung heroes" were not getting the recognition they deserved. *Id.*

Tony Clifton, a veteran reporter for Newsweek, said: "I have never had

There was censorship of our news media, and there was, in the course of that censorship, apparently some effort to control the course of American opinion about the war.²⁷ How, we must ask, can such practices be squared with our civics-book understanding of the first amendment command against government censorship?

Upon reflection, it is quickly apparent that there are strong reasons to support military censorship of the press during war-time, even in a democratic society committed to the protection of free speech. In favor of press censorship is the danger that the press might, inadvertently or deliberately, disclose information critical to the success of military operations, thus directly risking

movement so controlled, reporting so restricted." Clifton, *Frustrations for a Veteran Correspondent*, NEWSWEEK, Feb. 11, 1991, at 4. "[U]nless you break their petty regulations you see nothing." *Id.* Nor would the viewing public see anything not approved, because all TV news crews were required to use the same footage shot during briefings or during orchestrated "Photo op" expeditions to the front. PR Services, April 1991 (LEXIS, Nexis library, PRSVS file). The military escorts even went so far as to hand out lists of "suggested" questions to ask soldiers returning from battle. Clifton, *Trying to Get the Story is a Story of its Own*, NEWSWEEK, Feb. 11, 1991, at 36.

The most extreme case of censorship came when the ground assault began and Defense Secretary Cheney immediately announced a 48 hour news blackout. *The Bombs Never Missed*, *supra* note 25, at A9, col. 3. After 12 hours, however, the blackout was relaxed so that General Norman Schwarzkopf could pronounce a "dramatic success" for the initial assault. *Id.* Apparently, good news supersedes a blackout. One is left to wonder whether bad news would have had the same effect. The typical handling of news stories, however, was merely delay, sometimes as much as 72 hours. Getler, *supra*, at D4, col. 2.

Other less formal forms of prior restraint were also practiced by the military. A French TV crew, according to producer Alain Dobos, was forced at gunpoint by Marines to give up a videotape of a wounded U.S. soldier near Khafji. Zoglin, *Jumping Out of the Pool*, TIME, Feb. 18, 1991, at 39. After pool reporter Douglas Jehl of the L.A. Times reported that 50 U.S. military jeeps were missing, officials complained that his story, cleared by the censors, was not "in the best interests" of the military. *Id.* Jehl was subsequently ordered to leave his pool. *Id.*

27. Retired Army Colonel Darryl Henderson, in a New York Times article, said that "the military started years ago to study and train personnel in the techniques of 'marketing the military viewpoint' " to overcome the "Vietnam Syndrome" of no public support for the war. Wicker, *Marketing the War*, N.Y. Times, May 8, 1991, at A23, col. 5. This marketing is done "primarily by seeing to it that only upbeat reports went out to the public." *Id.*

By being able to control the press and what they saw, the military was able to force the media to rely on press briefings for information. The military thereby could exercise extreme control over what was known, and how it was presented. The choice of spokespeople was carefully made and the spokespeople were well-rehearsed before each session. Moreover, by providing a deluge of dry statistics, the Pentagon could appear to be giving out more information than actually was given. DeParle, *supra* note 25, at A9, col. 1; Getler, *supra*, note 26, at D1, col. 1.

American lives.²⁸ This, in turn, could threaten the success of the war effort, and perhaps even the vitality of the constitutional democracy on which the privileges of the first amendment depend.

Again, Operation Desert Storm supplies a classic example. American strategy called, we now know, for a surprise ground attack from a surprise direction.²⁹ As far as we can tell today, this strategy was singularly responsible for the Coalition's ability to retake Kuwait without suffering heavy casualties. If the press had learned of this plan and "scooped" it by premature reports, the element of surprise that was so critical to our military success could have been lost.³⁰ Thousands of American and other Coalition soldiers might have been killed, for no greater good than some increased circulation or a few ratings points.³¹ Had any of us been clothed with judicial robes and asked to approve censorship of a report that would have revealed this American strategy, we surely would have voted instinctively in favor of a prior restraint, no matter what the command of the first amendment.³²

28. The Gulf War was the first war in which the media had the capability to broadcast live—via satellite. Thus, the risk became even more pronounced that the Iraqis, who were known to be watching American broadcasts as well as censoring their out-going reports from Iraq, could take advantage of any inadvertent disclosure of information which could have compromised the Coalition's campaign.

29. For further discussion of U.S. military strategy, see *supra* note 7 and accompanying text.

30. The success of this attack dramatically disproved the conventional wisdom that, with the sophistication of modern warfare, a surprise ground attack had become virtually impossible—making tactical use of the element of surprise passé. Indeed, the Pentagon even manipulated an unwitting media to add to the element of surprise. By keeping the media corralled and providing them with selected information, the military was able to create the impression that the Coalition intended to make an amphibious assault. Zoglin, *It Was a Public Relations Rout Too*, TIME, Mar. 11, 1991, at 56.

31. News of the war was big business and it sparked intense media competition for war news audiences. In fact, because of its inside reports and continuous coverage, CNN's ratings outstripped all of the competition, showing an 11.7 rating/16.9 share during prime time for the period from January 15 to January 21, 1991. Brown, *War Boosts CNN Ratings*, BROADCASTING, Jan. 28, 1991, at 23, 24. Its closest network competitor, ABC, had an 11.5/16.7 rating. *Id.* Prior to the war, CNN's ratings were considered high if they reached a 1.2. *Id.*

32. Most Americans supported the Pentagon's policy of strictly limiting media reporting. They were also generally critical of the media. Some anecdotal evidence of the public attitude toward the media's handling of the war is supplied by a sketch performed on the irreverent television show *Saturday Night Live* (SNL). In a spoof on military briefings, SNL portrayed the reporters as over-lynosy and insensitive fact-hounds, asking questions like: "What is the one piece of information that would be most dangerous for the Iraqis to know?" Zoglin, *Just Whose Side Are They On?*, TIME, Feb. 25, 1991, at 52.

Walter Cronkite, one of the century's leading broadcast journalists, faulted the media itself for the public's attitude. He said that the press had submitted to

Perhaps many will take comfort in the thought that our Supreme Court probably would as well.

In *Near v. Minnesota*,³³ the very case that established the strong first amendment doctrine against prior restraints, the Supreme Court commented that “[n]o one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops.”³⁴ Although this comment was pure dictum,³⁵ *Near*’s hypothesis regarding the constitutionality of wartime prior restraints is as firmly rooted in constitutional law as any holding of the Court. For nearly sixty years, the Court has assumed, in reliance on *Near*, that some degree of censorship to protect military strategy and effectiveness in time of war is both inevitable and permitted by the first amendment.³⁶

Yet, even if one acknowledges the *Near* dictum as fundamental law, one must address the inherent limits of its hypothesis. *Near* imagined the constitutionality of a restraint on publication that actually, immediately, and specifically endangered lives and that directly frustrated military tactics.³⁷ It is a large leap from

the restrictions too readily, and had “failed to make clear the public’s stake in the matter . . . [—that] it is our war. Our elected representatives in Congress gave our elected president permission to wage [war]. We had better darned well know what they are doing in our name.” Cronkite, *What Is There To Hide*, NEWSWEEK, Feb. 25, 1991, at 43.

33. 283 U.S. 697 (1931).

34. *Id.* at 716 (footnote omitted). The Court reasoned: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” *Id.* (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

35. The *Near* case did not deal with wartime publication of military secrets. A Minnesota newspaper challenged the constitutional validity of a state statute which permitted a restraint upon the publication of “a malicious, scandalous and defamatory newspaper.” *Id.* at 705. The Court held the statute unconstitutional, as applied to publications charging neglect of duty and corruption upon the part of law-enforcing officers of the State, and allowed the defendant to prove the truth of his accusations as a defense. *Id.* at 722-23.

36. See, e.g., *Haig v. Agee*, 453 U.S. 280, 308 (1981) (where State Department regulation allowed revocation of a former CIA agent’s passport because he was engaged in a campaign to expose the CIA, Court held there was no first amendment protection because speech having the “declared purpose of obstructing intelligence operations” is not protected); *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (true, provable danger to national or troop security would warrant a prior restraint); *Gibson v. Florida Legislative Investigation Comm’n*, 372 U.S. 539, 567 (1963) (Douglas, J., concurring) (“Congress could punish the breach of a carefully drawn security law”).

37. More recently, Justice Brennan reiterated the need for a “clear and present danger” to exist before any restraint could be deemed constitutional:

this very focused type of restraint to the wholesale, systematic censorship of news that the military routinely conducted during the war with Iraq. *Near* certainly does not justify all, nor arguably does it even justify very much, of what military officials actually did by way of censorship during Operation Desert Storm.³⁸

More importantly, an overbroad reading of *Near* endangers critical first amendment values. There is an ever-present risk during wartime that the government may try to assert authority to restrain information beyond the limits of genuine military need. One must not forget the terrible nightmare of *Korematsu v. United States*,³⁹ in which the Supreme Court permitted (wrongly, we now agree), massive deprivations of civil liberties of Japanese-American citizens during World War II in the name of national security. *Korematsu* did not directly implicate the first amendment,⁴⁰ but it illustrates the hydraulic tendencies of military leaders to regard civil liberty as a threat to national security during wartime.⁴¹ It also graphically demonstrates the dangers that inhere in judicial deference to the military's own judgment that national security is actually imperilled.⁴² These same dangers arise when the military

Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient Unless and until the government has clearly made out its case, the First Amendment commands that no injunction may issue.

New York Times, 403 U.S. at 726-27 (Brennan, J., concurring).

38. For a discussion of the extent of military censorship during Operation Desert Storm, see *supra* notes 25-27 and accompanying text.

39. 323 U.S. 214 (1944).

40. *Korematsu* was convicted of violating a military order that required him to evacuate his home and relocate to a detention camp for Japanese-Americans. *Id.* at 215-16. *Korematsu* challenged his conviction, arguing that the order was racially and ethnically biased, and therefore unconstitutional. *Id.* at 218. The Court upheld the conviction. *Id.* at 219. Over 40 years later, that conviction was extinguished. For a description of the case that overturned the conviction, *Korematsu v. United States*, 584 F. Supp. 1406 (1984), see *infra* notes 41-42 and accompanying text.

41. The Commission on Wartime Relocation and Internment of Civilians, which reviewed the facts and circumstances surrounding the relocation of the Japanese-Americans during World War II, found "there was substantial credible evidence from a number of federal, military and civilian agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal." *Korematsu*, 584 F. Supp. at 1416.

42. The Commission also revealed that the DeWitt report, which was the basis for the Executive Order implementing this evacuation, contained "wilful historical inaccuracies and intentional falsehoods" and that the government

takes to itself the role of deciding what news is "fit to print" about its own handling of military affairs.⁴³

Consider for a moment the mind-set of the military censor. He or she is necessarily part of the command and privy to the most sensitive secrets of the war. The censor is fully committed to the military strategy that has been adopted and is eager for its success. He or she is equally committed to the view that utmost secrecy is essential to achieving victory—otherwise, the censor's job would seem a pointless waste of time, and none of us likes to think of our life's work as pointless. Moreover, the censor knows that approval from superiors, and with that approval benefits like promotion, will be seriously jeopardized if even one secret gets out. That approval probably will not be greatly at risk, however, if the censor sometimes unnecessarily denies clearance to print. In addition, the censor knows that, however angry the press might be about any one particular judgment, the fast-moving pace of wartime events, together with the need for the press to cultivate friendly relations with its censors, most likely precludes any vigorous attempt by the press at forcing reconsideration of the censor's decisions. Therefore, the military censor, to avoid what would appear to be the greater harm—the slightest risk of incurring the displeasure of the military command, will almost surely give "breathing space" to the *military*, *not* the press. In other words, a system of military censorship is almost guaranteed to be substantially overbroad in the prior restraints it enforces.⁴⁴ Such zeal by the censor, however, does run a risk of backfiring. A press

knowingly withheld information from the court when it was deciding the question of military necessity in that case. *Id.* at 1417-18.

43. The reference in the text is, of course, to the famous motto of the New York Times, "All the news that's fit to print."

44. The Supreme Court has addressed the issue of overbroad restraint by censorship, although not with military censors. See *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman*, the challenger was convicted for exhibiting a movie without first submitting it to the state censorship board for licensing. *Id.* at 52. He argued that the censorship scheme was an invalid prior restraint. *Id.* at 54. The Court held that "[t]he administration of a censorship system . . . presents peculiar dangers to constitutionally protected speech." *Id.* at 57. The Court further stated that the danger of overbroad application was especially prevalent because "the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits" *Id.*

Similar concerns are implicated in the context of military censorship because of the administrative nature of the military's commanding offices. For a general discussion of these concerns, see Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 656-59 (1955) (due to nature and process of executive branch, censorship through prior restraint is too readily accomplished, and with too little opposition or judicial review); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 421-22 (1983) (citing Emerson, Jeffries reiterates

that believes it is being too restrained might decide to bypass the censorship system and visit the consequences.⁴⁵

The only Supreme Court decision actually involving a government attempt to enforce a wartime prior restraint, *New York Times Co. v. United States*,⁴⁶ significantly reinforces the notion that a military left to its own resources will engage in vastly overbroad censorship. There, the government unsuccessfully sought injunctions against publication of the so-called "Pentagon Papers."⁴⁷ It turned out that these materials, far from involving immediate strategy and troop deployment, often concerned events that had happened years and even decades before.⁴⁸ Faced with the prospect of such a blunderbuss restraint, the Court concluded that the government simply had failed to meet its "heavy burden" of showing that disclosure threatened the immediate security of American forces then fighting in Vietnam.⁴⁹

In *New York Times*, the conclusion seemed inescapable that the government was trying to avoid, not the disclosure of strategically sensitive information, but the negative public reaction that would follow if the people learned about the mistakes American policymakers and strategists had made in Vietnam. The government, in other words, was trying to use the pretext of national security to accomplish censorship's age-old, forbidden purpose—the control of public opinion.

New York Times is the only case decided by the Supreme Court directly addressing the government's power to invoke prior restraints in the name of national security. As landmark Supreme Court cases go, however, this one decided remarkably little. While six members of the Court agreed on the outcome, they

idea that prior restraint can be abused with ease when left unchecked in hands of administrative process).

45. For example, many journalists covering the war struck out on their own, defying the military's pooling system because they felt that they were not being told the whole story. Zoglin, *Jumping Out of the Pool*, *supra* note 26, at 39. Of course, this conduct could also be attributed, at least in part, to a need for "scoops" to ensure high ratings. *See id.* Most notable of these reporters who went off on their own was Bob Simon of CBS, who was captured by the Iraqis. What this demonstrates, however, is that the tight control established by the military actually brought about that which it was supposed to prevent. BROADCASTING, Mar. 4, 1991, at 90.

46. 403 U.S. 713 (1971).

47. *Id.* at 714.

48. *Id.* at 722 n.3 (Douglas, J., concurring) (all material listed in government's *in camera* brief concerned history, not future events—"[n]one of it is more recent than 1968").

49. *Id.* at 714.

agreed very little on the reasons. Justices Black and Douglas argued for nearly absolute protection for the press against government censorship, a view that would cast the legitimacy of the *Near* dictum itself into doubt.⁵⁰ Justice Brennan preferred to employ an exacting version of the clear and present danger test that would turn on a strong showing of immediate danger to American strategic interests.⁵¹ Justices White and Stewart adhered to a very narrow conclusion that the government had failed to make a sufficient showing of harm from publication.⁵² They, along with Justice Marshall, stressed the absence of congressional authorization for injunctive relief.⁵³ While none of these views commanded sufficient support to muster even a plurality of the Court, the case did at least lend some force to the notion that governmental power to censor during wartime is subject to fairly strict

50. Justice Black in his concurrence stated: "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.* at 717 (Black, J., concurring). Similarly, Justice Douglas concluded that the first amendment command that "'Congress shall make no law . . . abridging the freedom of speech, or of the press' . . . leaves, in my view, no room for governmental restraint on the press." *Id.* at 720 (Douglas, J., concurring) (quoting U.S. CONST. amend. I).

For a discussion on the dictum of *Near v. Minnesota*, 283 U.S. 697 (1931), see *supra* notes 13 & 20 and accompanying text.

51. Justice Brennan stated:

Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient. . . . Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

New York Times, 403 U.S. at 726-27 (Brennan, J., concurring).

52. "We hold that the United States has not met its burden. . . . To sustain the Government in these cases would be to start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction." *Id.* at 732-33 (White, J., with whom Stewart, J., joined, concurring).

53. According to Justice Marshall, "[i]t would . . . be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit." *Id.* at 742 (Marshall, J., concurring). Justice White agreed.

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from the unauthorized disclosure of potentially damaging information [via 18 U.S.C. §§ 793, 798 (1948)]. However, Congress has not authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press.

Id. at 740 (White, J., concurring).

limits and that any permissible censorship must be supported by specific national security needs.

If the force and significance of *New York Times* was doubtful the day it was decided, it is even more doubtful today. Of the justices voting with the majority, only one, Justice White, remains on the Court; four have been replaced by justices with decidedly more pro-governmental leanings than their predecessors.⁵⁴ Given the Rehnquist Court's willingness to reconsider other precedent in the first amendment arena,⁵⁵ it is very possible that a new test case on military censorship would produce a significant departure from even these basic teachings of *New York Times*.

Not everyone, however, sees the lack of consensus between the justices in *New York Times* as necessarily detrimental. Shortly after the case was decided, Professor Kalven astutely observed that the uncertainty of the case may actually be one of its greatest virtues.⁵⁶ In Professor Kalven's view, the Court, faced with a virtual minefield of constitutional perplexities, wisely refused to go more than a few tentative steps.⁵⁷ While the Court disallowed the patently overbroad censorship attempt at issue, it left open the possibility that, in other circumstances involving national security, the necessary showing for a prior restraint might be established and other routes of control over the press, such as post-publication criminal prosecution, might remain open.⁵⁸ What the *New*

54. While this Article was being prepared, Justice Marshall retired and his successor, Justice Clarence Thomas, was confirmed. Justice Thomas has not, to the author's knowledge, stated a clear position on the issues in this Article.

55. Indeed, Chief Justice Rehnquist said in an article in the *New York Times* that, while adherence to precedence was preferred, it was "not an inexorable command." Greenhouse, *High Court Widens Evidence Allowed in Capital Cases*, *N.Y. Times*, June 28, 1991, at A1, col. 4, A15, col. 1. The decisions of the Court have already evidenced this predilection to reconsider precedent. See, e.g., *Osborne v. Ohio*, 110 S. Ct. 1691 (1990) (upholding Ohio statute proscribing possession and viewing of child pornography, thus limiting *Stanley v. Georgia*, 394 U.S. 557 (1968)); *Employment Div., Dep't of Human Resources v. Smith*, 110 S. Ct. 1595 (1990) (concluding that free exercise clause permits state to prohibit sacramental use of peyote and deny unemployment benefits to one who is discharged from employment for such use, limiting *Sherbert v. Verner*, 374 U.S. 393 (1963)). Perhaps the most controversial instance of "new" Court thinking is the current shift in the abortion arena. Compare *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion) (right to abortion considered "liberty interest") with *Roe v. Wade*, 410 U.S. 113, 153 (1972) (right to abortion part of fundamental right to privacy).

56. Kalven, *The Supreme Court, 1970 Term, Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 33-34 (1971) (Court left open for later debate what truths about government may be kept from public under "security concerns" through use of government sanctions).

57. *Id.*

58. *Id.* Professor Kalven stated:

York Times Court did, therefore, was effectively to leave federal officials a fairly large zone of discretion to pursue their policies regarding wartime censorship.

The practical result of the *New York Times* decision was that the scope of press freedom during wartime was left largely where it had been for over a century—to a process that may best be characterized as “negotiation” between the press and the military. In most American wars since the Civil War, this process had secured *voluntary* submission by the press to censorship.⁵⁹ At the same time, military officials had been willing to share much, though surely not all, pertinent information about their military endeavors with the press corps. In a sense, one could say that the government bargained away some of its power to control the *disclosure* of information—a power that the Court in other contexts has regarded as relatively unaffected by first amendment concerns⁶⁰—in exchange for the press’s willingness to submit to systematic censorship without mounting a first amendment challenge. Under this implicit “deal,” access became the *quid pro quo* for prior restraint.⁶¹

This system worked relatively well in the past. It existed during World War II, Korea and, to some extent, during Vietnam.⁶² It offered the virtue of avoiding a court challenge which would force the Supreme Court to define with greater precision the ex-

[The *New York Times* decision] left the Court free, if necessary, at some later time in a criminal prosecution to [make] a determination of the kinds of truths about government activity to the dissemination of which government may for security reasons apply sanctions to keep them out of the reach of public opinion.

Id. at 33.

59. For an overview of the history of wartime censorship, see Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and “Off-the-Record Wars,”* 73 GEO. L.J. 931, 932-45 (1985) (military has historically deemed access by press to war zone inappropriate and has always engaged in varying degrees of censorship of frontline reporting); Gottschalk, “*Consistent With Security*” . . . *A History of American Military Press Censorship*, 5 COMM. & L. 35 (Summer 1983) (chronicling censorship of press during wartime, from Revolutionary War to Vietnam); Lubow, *Read Some About It*, THE NEW REPUBLIC, Mar. 18, 1991, at 23-25 (type of censorship placed on reporters during Gulf War was status quo; Vietnam’s openness was anomaly which probably will not be seen again).

60. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (upholding power of CIA to punish wrongful disclosure of classified information by former agent who published book about his experiences).

61. For a discussion of one broadcaster’s attitude towards the relationship between access and prior restraint, see Cronkite, *supra* note 32 and accompanying text.

62. For a discussion of the relative merits of the “access for prior restraint bargain,” see Cassell, *supra* note 59, at 937-45.

tent of permissible wartime censorship. It is likely that both the government and the media sensed that such a judicial challenge might well work to everyone's disadvantage: the press would suffer because the Court would probably, for the first time in history, directly sustain the constitutionality of some prior restraint on political speech; the military would suffer because the Court would be constrained to place some limit on the discretion of military censors in order to protect first amendment values. Thus, both sides tacitly agreed, in this area at least, that the exact limits of the first amendment freedom of the press were best left undefined.⁶³

Toward the end of the Vietnam conflict, however, the historic cooperation between press and military began to break down. There seems to have been a lingering sense among military officials that the graphic, and often critical, media portrayal of the events in Vietnam harmed the war effort by weakening public support and damaging troop morale.⁶⁴ The *New York Times* decision itself probably contributed to the breakdown, in part by symbolizing a shift from cooperation to antagonism in military-press relations, and in part by disturbing the equilibrium in "bargaining power" between these two institutions. By imposing a strong barrier to judicially supervised censorship, *New York Times* also may well have contributed to a fundamental change in focus by the Pentagon—from censorship to control of access as the chief means of limiting press reporting on military affairs.

After Vietnam, the Pentagon announced a new policy that would both restrict and place under direct military supervision

63. In his dissent in *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justice Blackmun alluded to the danger of fixing standards for the scope of press rights during wartime:

First Amendment absolutism has never commanded a majority of this Court. . . . What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck*, "It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right."

Id. at 761 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

64. For further discussion of the media's coverage of the Vietnam conflict, see Cassell, *supra* note 59, at 941-42 and accompanying text.

media reporting on future military undertakings.⁶⁵ The implementation of this policy in subsequent deployments of American military forces demonstrated increasing resistance to press interests. This was especially true in Grenada, when American forces moved in to topple a communist regime, and in Panama, when American forces were used to oust and capture Manuel Noriega.⁶⁶ In these instances, members of the press were virtually excluded until the critical phases of each operation were over. Members of the press complained bitterly,⁶⁷ but any opportunity for legal challenge was prevented by the swift completion of each of these military exercises. For example, in *Flynt v. Weinberger*,⁶⁸ a publisher challenged the Pentagon's policy on press access in Grenada, but the Court of Appeals for the District of Columbia Circuit held that the challenge was moot—the invasion was over and the press restrictions had been lifted.⁶⁹

65. This policy, established by the Department of Defense, placed severe access restrictions upon the press during the invasions of Grenada and Panama. See *Nation Magazine v. United States Department of Defense*, 762 F. Supp. 1558, 1563 & n.3 (S.D.N.Y. 1991) ("DOD placed significant restraints on media coverage, particularly in terms of access for newsgathering purposes."). After the press's complaints regarding their exclusion from Grenada, the military convened a panel to study the access problem. Headed by Major General Winant Sidle, this panel (Sidle Panel) developed a basic framework of rules to govern future access. Note, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press a Right of Access to Wartime News*, 58 TEMP. L.Q. 873, 878-82, app. at 902-03 (1985) (reprinting cover letter by General Sidle to General Vessey and Report by CJCS Media-Military Relations Panel). For a further discussion of this report and its subsequent application and modifications during Operation Desert Storm, see *infra* notes 112-13 and accompanying text.

66. Reporters were completely banned from Grenada for the first two days of the operation. When four journalists reached the island by boat, the military removed them and placed them on the carrier *Guam*. Cassell, *supra* note 59, at 944; Note, *supra* note 65, at 875-76. Two days after the invasion, troops took reporters on a guided tour of the island but did not allow them free access until several days after the fighting had ceased. Cassell, *supra* note 59, at 943-45; Note, *supra* note 65, at 875-76. In Panama, no reporters had access to the operation until the second day, and even then, access was under the strict control of the Pentagon. Olson & Daly, *The First Casualty of War*, RECORDER, Jan. 25, 1991, at 4.

67. See Note, *supra* note 65, at 876 n.24 & app. II; Gailey, *U.S. Bars Coverage of Grenada Action, News Groups Protest*, N.Y. Times, Oct. 27, 1983, at A1, col. 6. For criticism of the policy vis-à-vis Grenada, see Lewis, *What Was He Hiding*, N.Y. Times, Oct. 31, 1983, at A19, col. 5; Safire, *Us Against Them*, N.Y. Times, Oct. 30, 1983, at E19, col. 1.

68. 762 F.2d 134 (D.C. Cir. 1985). The press was denied access to cover the U.S. military intervention in Grenada from October 25-27, 1983. *Id.* at 134-35. Thereafter, "a limited number of press representatives, including one of the appellant's reporters, [were] transported by military aircraft to Grenada." *Id.* at 135. On November 7, 1983, all travel restrictions to Grenada were lifted, giving the press unlimited access to the island. *Id.*

69. *Id.* at 135. The court concluded that the exception to the mootness

In Operation Desert Storm, the smoldering disagreement between the press and the military came even more visibly into the open. Members of the press publicly complained that the military was extremely stingy with information, that much of what was disclosed was varnished to such a high public relations gloss that the accuracy was suspect, and that government censorship was often preoccupied with style and "packaging" more than substance.⁷⁰ The military, in turn, complained that the press was petulant, meddlesome and recklessly unsympathetic to the realities of military operations. One result of this dispute was a court challenge to the government's system of restraints by dissatisfied members of the media in *Nation Magazine v. United States Department of Defense*.⁷¹ This challenge, like that in *Flynt*, was once again dismissed on justiciability grounds, thanks to the rapid completion of the military enterprise.⁷²

While the focus of the litigation in both *Flynt* and *Nation Magazine* was access, if there is any merit to the notion that access and censorship issues are interrelated, the instigation of these lawsuits may signal that cooperation between the press and the military on the question of prior restraints may also be nearing an end. Given the favorable outcome for the press in *New York Times*, an attack on censorship is a trump card the press will almost surely have to play in future litigation against the government over war-time media rights.

At least for now, the delicate balance produced by the Supreme Court's policy of issue avoidance has been preserved by the happenstance of an unbelievably quick and successful end to the Persian Gulf war. The balance is getting more precarious

doctrine for those controversies "capable of repetition, yet evading review" did not apply because "there is no reasonable expectation" that the Grenada controversy will recur. *Id.*

70. See Corliss, *A Review: Performin' Norman at Center Stage*, TIME, Mar. 11, 1991, at 57; Zoglin, *It Was A Public Relations Rout Too*, *supra* note 30, at 56.

71. 762 F. Supp. 1558 (S.D.N.Y. 1991).

72. According to the *Nation Magazine* court, "past injury alone is not sufficient to merit the award of relief against future conduct." *Id.* at 1569. Judge Sand's opinion is a curious piece of judicial statesmanship. First, he rejected the government's claim that the matter was a political question. *Id.* at 1566-68. Second, while he concluded that some claims were moot, he found that others escaped mootness because they were "capable of repetition, yet evading review." *Id.* at 1570. Nevertheless, relying on *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), he concluded that the claims which survived were "too abstract" to be appropriate for judicial decision. *Nation Magazine*, 762 F. Supp. at 1575. This was probably the narrowest ground on which he could rule, since as Judge Sand himself observed, in another military episode the same level of abstraction might not recur. *Id.*

however, and in a future conflict, the Court may be forced to revisit the issue of military censorship. The risks posed by revisitation to both press and Pentagon are great. To remain consistent with the principles on prior restraint worked out in other contexts would require the Court to place heavy burdens of persuasion on the military—burdens that the military might well be unwilling or unable to meet.⁷³ Yet, the desire not to interfere with successful war waging might tempt the Court to relax those burdens, thereby weakening the policy against government censorship that lies at the core of the first amendment protection for the press.⁷⁴

73. For cases discussing the permissibility of prior restraints, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) ("[T]he barriers to prior restraint remain high and the presumption against its use continues intact."); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (The government "thus carries a heavy burden of showing justification for the imposition of such a restraint."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); *Near v. Minnesota*, 283 U.S. 697 (1931). For a discussion of *New York Times Co.* and *Near*, see *supra* notes 13, 20, 35 & 46-53 and accompanying text.

74. The Court's longstanding tradition of deference to the executive and legislative branches in military affairs lends further support to the notion that it might relax restrictions on wartime prior restraints. For example, the Court has allowed greater prohibitions on speech in circumstances dealing with the military. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (speech may be prohibited on military base); *United States v. O'Brien*, 391 U.S. 367 (1967) (burning of draft cards may be prohibited); *Schenck v. United States*, 249 U.S. 47 (1919) (distribution of anti-war circulars to draftees may be prohibited). The Court has additionally acknowledged greater deference to congressional and executive determinations on military affairs. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1988) (Congress is accorded great deference in area of authority over national defense and military affairs); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (federal government may not be sued in tort for claims arising from government contractor's negligence); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (wearing of yarmulke by those in military uniform may be prohibited); *Snepp v. United States*, 444 U.S. 507 (1980) (CIA may, as condition of employment, obtain employee's promise to refrain from publishing any information relating to the agency; if employee breaches agreement, government may seek specific performance of restrictive covenant as well as compensatory damages); *Feres v. United States*, 340 U.S. 135 (1950) (federal government may not be sued in tort for injuries sustained incident to military service).

This potential relaxation on prior restraint restrictions could have both a procedural and a substantive content. Procedurally, the Court might suspend the traditional requirements of prompt pre-censorship hearings before an impartial tribunal, probably on the ground that these requirements would pose unreasonable barriers to swift military action. *Cf. Freedman v. Maryland*, 380 U.S. 51 (1964) (any restraint prior to judicial review must be limited to preserving status quo for shortest time judicially sound and must be followed by a prompt final judicial determination); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1962) (system of prior administrative restraints must contain means for notice, hearing and judicial review before publication may be determined to be "objectionable").

III. ACCESS TO MILITARY OPERATIONS

As difficult and troubling as the issue of prior restraints during wartime may be, the question of press access to wartime affairs is, if anything, even more baffling. At least with the question of prior restraint, we know we are dealing with speech, and we know something about the Framers' attitudes toward censorship. "Access," however, is not clearly speech. When a reporter claims a right of access, he or she is asking for a right to be in certain places, to speak to certain people, to learn certain data, or to witness certain events. There are strong reasons to believe that some of this behavior is primarily "conduct," not "speech," and therefore outside the protection of the first amendment.⁷⁵

Indeed, one can go further in the distinction between prohibition of access and prior restraint. In the wake of *New York Times*, Professor Alexander Bickel, who represented the *New York Times* in that case, argued that untrammelled government control over

Substantively, the Court might be tempted to reduce the degree of particularity required for a showing that publication would endanger military forces, probably on the ground that nonmilitary judges lack sufficient expertise to appreciate subtle dangers of disclosure. Cf. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565-70 (1976) (while "barriers to prior restraint remain high and the presumption against its use continues intact," no finding that alternative measures would not have protected defendant's rights; "Nebraska Supreme Court did no more than imply such measures might not be adequate"). As the Court reasoned in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), "the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." By analogy, the Court might well take the view that the "characteristic nature and function" of warfare necessitate a system of censorship that confers substantially greater discretion on the censor. See also Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) (discussing procedural components of first amendment protections).

75. The Supreme Court has often relied on the distinction between conduct and speech to define the limits of the first amendment. Indeed, in several cases involving freedom of the press, including one decided last term, the Court has held that the newsgathering activities of the press are subject to regulation because they do not directly involve speech. See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991) (where press breached promise of confidentiality to news source, first amendment does not bar promissory estoppel, a state-law doctrine; nor does first amendment require that protection for the press mandate stricter scrutiny than would be applicable to others); *Haig v. Agee*, 453 U.S. 280 (1981) ("To the extent the revocation of [former CIA agent's] passport operates to inhibit [him], it is an inhibition of *action*, rather than of speech."); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (requiring newsmen to appear and testify on news sources before grand jury does not "abridge the freedom of speech and press guaranteed by the First Amendment"); *Zamel v. Rusk*, 381 U.S. 1, 16-17 (1965) (Secretary of State did not deny passport selectively on basis of political belief or affiliation, but imposed general ban on travel to Cuba following break in diplomatic relations; "there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow").

disclosure of information is a critical condition precedent to the first amendment doctrine against prior restraint. Because the government has the power to prevent disclosure in the first place, we can afford the luxury of denying it the power to prohibit publication of information that has been disclosed.⁷⁶ Arguably, the Court implicitly adopted this view in the national security arena in *Snepp v. United States*,⁷⁷ where it upheld the power of the government to penalize a former agent of the CIA for publicly disclosing classified information. The Court has also explicitly relied on government control of access as a "less restrictive alternative" to punishment of speech in other contexts, most notably in *Florida Star v. B.J.F.*⁷⁸ There, the Court concluded that, while the government may refuse to disclose the identity of a rape victim, it may not subject the press to liability for publishing the name of a victim that has been inadvertently released.⁷⁹

76. See A. BICKEL, *THE MORALITY OF CONSENT* 79-80 (1975). Professor Bickel states:

The government is entitled to keep things private and will attain as much privacy as it can get away with politically by guarding its privacy internally. . . . Yet the power to arrange security at the source, looked at in itself, is great, and if it were nowhere countervailed it would be quite frightening . . . since the law in no wise guarantees its prudent exercise or even effectively guards against its abuse. . . . If we should let the government censor as well as withhold that would be too much dangerous power.

Id.

77. 444 U.S. 507 (1980) (Court held that employment agreement requiring pre-publication review of CIA employee's book was not prior restraint).

78. 491 U.S. 524 (1989). According to the *Florida Star* Court:

To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or officials where the government's mishandling of sensitive information leads to its dissemination. Where the information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.

Id. at 534; see also *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 495 (1978) ("By placing information in the public domain in official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) (where court could control access through power to close a courtroom but did not, "what transpires there could not be subject to prior restraint").

79. *Florida Star*, 491 U.S. at 538. As evidenced by *Florida Star*, the Court has

Yet, as the Court itself has recognized, the right of free speech is a paltry right indeed if it does not include in *some* degree an attendant right to the wherewithal of speech.⁸⁰ How, for example, could we criticize our government if that government had the power to declare all its operations secret? We cherish free speech because it allows a "marketplace of ideas"⁸¹ in which we can, individually and democratically, decide for ourselves what is the truth. We simply cannot do that, however, if the government can stop us from learning the facts on which our ideas about truth, particularly political truth, are based. For speech to be *meaningfully* free, it must be accompanied by other instrumental

been quite careful in explicitly protecting disseminators of information who are outside the government. Once governmental outsiders have obtained information, the government cannot, without a strong showing, penalize its publication. See, e.g., *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975) (television station cannot be punished for broadcasting name of 17-year-old rape victim which had been obtained from the courthouse records); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978) (Court reversed conviction of newspaper which had published results of proceedings before commission responsible for inquiries into complaints of judicial disability or misconduct; state had not met standard of showing clear and present danger to administration of justice which would result from publication); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-20, 12-21 (2d ed. 1988) (discussing ability of government to withhold certain types of information from public based upon content and source of information).

80. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (pluralist opinion). In *Richmond Newspapers*, the Court held that the right of the public and press to attend criminal trials was guaranteed by the Constitution; "[i]t is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right to access,' or a 'right to gather information' for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" *Id.* at 576 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (citations and footnote omitted)); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'").

81. This expression is derived from Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"). The Court's frequent references to Justice Holmes' famous phrase demonstrate the degree to which this concept has become embedded in first amendment jurisprudence. For Supreme Court opinions referring to this phrase, see *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (Marshall, J., dissenting); *Flynt v. Falwell*, 485 U.S. 46, 49 (1988); *F.C.C. v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 787 (1978); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973); *Garner v. Louisiana*, 371 U.S. 415, 437 (1963); *Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting); *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

rights, among them at least some measure of a right of access to information about government events.

This public interest in access is particularly acute during a foreign war. Unless the press can tell us what is happening with reasonable accuracy and precision, we have no independent way of knowing. If we cannot know about the events in war, we are simply unable to exercise any form of democratic control over those who wage it with our money and our blood.⁸² Without government disclosure of information relating to the rationale, scope, cost, execution, and success or failure of operations, we are collectively disenfranchised. Without disclosure, the press is as effectively precluded from performing its historic "watchdog" role as if the government had instituted a massive system of prior restraint.⁸³

Indeed, a war without some right of press access begins to approach one of the horrors of modern government imagined by George Orwell in 1984.⁸⁴ His imaginary society was perpetually involved in some nameless, shapeless, pointless foreign conflict that the government manipulated as a means of social control and as a justification for its "Big Brother" tactics.⁸⁵ Like most such

82. As Justice Black has stated: "[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

83. Professor BeVier has observed that denial of access can have much the same effect on the flow of information and ideas as censorship.

[T]he denial of access undoubtedly impedes the [information gathering] process and thus constricts the flow of information to the public. The effect on the flow of information, therefore, of governmental denials of access of information is in that respect similar to the predictable effects of punishment or censorship. . . .

Perhaps more importantly, governmental denial of access to information poses a different kind of direct threat to speech than do punishment and censorship, and thus the forms of governmental activity directly implicate different values. Punishment or censorship directly undermine the value of *free* speech, while the denial of access to information undermines the value of *well-informed* speech.

BeVier, *supra* note 17, at 498-99.

84. G. ORWELL, 1984 (2d ed. 1977).

85. *Id.* at 35-36. Orwell's protagonist worked in the Ministry of Truth, where he "rectified" old newspaper stories so that they did not contradict current ideology, or contain economic or social forecasts which did not square with the present reality. *Id.* at 39-44. This included maintaining the illusion that the current war, even though alliances and enemies had shifted again and again, was the war that had always been ensuing. *Id.* at 34-35. Big Brother's rationale for this deception was that "'who controls the past' . . . 'controls the future: who controls the present controls the past.'" *Id.* at 35. Thus, "if all records told the same tale—then the lie passed into history and became truth." *Id.* By rewriting

visions, Orwell's apocalypse did not arrive on schedule, at least in the Western hemisphere. One is tempted to observe, however, that the 1980s did produce a series of military episodes—the Falkland Islands for the British, Grenada and Panama for the Americans—that bear at least some superficial resemblance to the kind of war-as-social-control that Orwell envisioned.

I believe that most of us who followed the unfolding of events in the Persian Gulf at some level experienced concern about access to news of the war. We were acutely aware of the fact that our armed forces were facing what was then the fourth largest military machine in the world. Our enemy was battle-tested and experienced as a result of the Iran-Iraq War. We were not. Our enemy was experienced in desert warfare. We were not. Our enemy had many of the sophisticated tools of modern warfare—tanks, jet fighters, air and sea missiles. We were significantly superior in these technological categories, but few of our weapons had any track record in actual combat.⁸⁶ We knew that our enemy had biological and chemical weapons and that it had used such weapons with brutal effectiveness in the past.⁸⁷ At the outset of hostilities and at each major point of escalation, we were, I believe, frightened that this conflict could develop into a major war with major bloodshed. However strongly we publicly voiced our support for American and Coalition forces, many of us, I believe, were privately concerned that this war might prove to be a dreadful and costly mistake.⁸⁸

history, therefore, Big Brother could maintain a tarnish-proof image of being an infallible government.

86. Atkinson, *Pentagon Speeds Development, Production of Arms for Gulf Use*, Washington Post, Dec. 24, 1990, at A1, col. 1 ("A major war in the Gulf would, in effect, serve as a proving ground for a number of military concepts adopted by the United States in the fifteen years since South Vietnam fell. . . . We have a tremendous amount of new equipment and weaponry that we are using for the first time." (quoting Retired Colonel Trevor N. Dupury, to the House Armed Services Committee)). In addition, many new weapons also had their development speeded up, and their pre-deployment testing shortened. *Id.*

87. Watson, *The Point of Attack*, NEWSWEEK, Feb. 11, 1991, at 24. Iraq warned repeatedly that it would use chemical weapons as it had in the past against both Iran and Kurdish civilians. *Id.* at 25. Iraq's chemical arsenal included both mustard gas and various nerve gases deliverable by warplane, helicopter or missile. *Id.* The standard form of delivery, however, was to place the warheads on artillery or mortar shells. *Id.* Iraq also had been working on biological weapons using virulent diseases such as Anthrax, but it was doubted that Iraq had these weapons at a usable stage of development. *Id.*; see also 20/20: *Saddam's Deadly Mix* (ABC television broadcast, Feb. 15, 1991) (LEXIS, Nexis library, ABCNEW file) (detailed account of Iraq's capabilities and past usage of chemical weapons and the effects of those weapons).

88. Although he in fact voted in favor of giving President Bush authority to

Perhaps for these reasons, perhaps for others, the American public had an insatiable appetite for news of the war. Many of us acquired what came to be dubbed "CNN syndrome"⁸⁹—habitual tendency to stay glued to radio and television for almost hourly updates on the war. We awoke and had breakfast to news of the war; we pored over newspapers that contained little else besides war news; we constantly interrupted our workdays to find out how things were going in the Persian Gulf; we absorbed all the footage of wartime we could get on expanded versions of the evening news; we fell asleep to nighttime broadcasts about the war; we even had our children tune in to special Saturday morning editions of war news for kids.⁹⁰

It is not simply that all this coverage was available. We demanded it, read it, listened to it, and watched it. We, in other words, sought "access" to all the information about the war we could get. When the press and the media demanded that military officials give them access to more information about the war, they were acting in and reflecting our interests.

The mere desire for information, however intense, does not of course establish a constitutional right to receive it. On the question of whether the first amendment affords a right of access to military affairs there is literally no law at all.⁹¹ Although the idea that the first amendment might include a right of access to governmental activities is not entirely without precedent, the

go to war, Representative Jim Cooper, Democrat from Tennessee, later admitted that a fear of failure was commonplace at the time. "A few months ago, we thought that everything would go wrong, that casualties would be enormous, that there would be unforeseen catastrophes, that Murphy's law would prevail." Dionne, *Kicking the "Vietnam Syndrome": Victory Sweeps Away U.S. Doomed-to-Failure Feeling*, Washington Post, Mar. 4, 1991, at A1, col. 1, A21, col. 1 [hereinafter *Vietnam Syndrome*].

89. Davison, *Britain Faces Threats With a Stiff Upper Lip*, Sunday Times (London), Jan. 27, 1991, at 20, col. 6 ("CNN Syndrome" described new American condition, named after 24-hour cable network, "which had led to people suffering stress from over-exposure to war coverage").

90. From August 5, 1990 to March 1, 1991, there were over 120 broadcasts on one network alone (excluding the daily evening news reports) regarding the Gulf War, including 21 special reports in the first three days of the ground war. For information regarding the extensive coverage provided by the press, see Kurtz, *The Media Bombardment: Saturation Coverage, T.V. v. Newspapers*, Washington Post, Feb. 6, 1991, at C1; Zoglin, *How Dailies Cover a T.V. War*, TIME, Feb. 11, 1991, at 78. However, one reporter also noted that, despite saturation coverage, the average American had very little real knowledge of what was happening. Zoglin, *Volleys on the Information Front*, *supra* note 23, at 44. This was due in part to the nature of air war behind enemy lines, and in part to the press restrictions. *Id.*

91. See Kalven, *supra* note 56, at 28 & n.130 (discussing absence of law concerning whether first amendment affords right of access to military affairs).

Supreme Court has never recognized such a right to information about military operations. Moreover, the Court has been very cautious about recognizing any rights of access under the first amendment at all.⁹² Consequently, although a case can be made for a right of wartime access, establishing such a right is what in military idiom might be termed an "uphill march."⁹³

The leading case on a first amendment right of access is *Richmond Newspapers, Inc. v. Virginia*.⁹⁴ In that case, a plurality of the Court did recognize a first amendment right of access to criminal trials.⁹⁵ The *Richmond Newspapers* plurality relied on a handful of prior cases recognizing, in a variety of contexts, that freedom of

92. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

93. "As in so many instances perspective will depend upon the corner from which one comes at the problem, on whether one sees it as a matter of *adjusting security considerations* in order to allow information into the domain of public opinion, or as I would incline, as a matter of *withdrawing information* from the public domain on security grounds." Kalven, *supra* note 56, at 35.

94. 448 U.S. 555 (1980); *see also* *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("First Amendment . . . [does not] mandate[] a right of access to government information or sources of information within the government's control"); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (statute which prohibited speeches and demonstrations of partisan political nature on military installation did not violate first amendment); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (FBI policy prohibiting personal interview between newsmen and individually designated inmates did not violate first amendment because "it d[id] not deny the press access to sources of information available to members of the general public"); *Pell v. Procunier*, 417 U.S. 817, 824-28 (1974) (statute barring media interviews with specific inmates did not violate first amendment where ample alternative channels of communication existed for inmates); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (newspaper reporter must respond to grand jury subpoena notwithstanding agreement by reporter with news source to conceal facts); *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 378-79 (1979) (press does not have right of access to pre-trial hearing; trial judge may take protective measures to minimize effects of pre-trial publicity even where not strictly necessary).

95. "We hold that the right to attend criminal trials is implied in the guarantees of the First Amendment. . . . Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers*, 448 U.S. at 580-81.

The Justices did not agree, however, on where that right was to be found. Justice Stevens, relying upon *Saxbe* and *Houchins*, expansively viewed those decisions as "unequivocally hold[ing] that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583 (Stevens, J., concurring).

Justice Brennan, joined by Justice Marshall, canvassed the Court's history of access cases, including *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Zemel v. Rusk*, 381 U.S. 1 (1965), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as well as *Saxbe* and *Houchins*. 448 U.S. at 585-89 (Brennan, J., concurring). He emphasized that this right of access must be drawn from an historical consideration of the tradition of "public entree to particular proceedings or information," and a

speech sometimes entails a right to gather or receive information or a right of access to certain places for expressive purposes.⁹⁶ A few subsequent cases, in turn, have cautiously extended the *Richmond Newspapers* ruling.⁹⁷ The Court repeatedly has warned, however, that general rights of access do not exist within the first amendment and its ad hoc decisions on access rights of the press should not be read beyond their own factual contexts.⁹⁸

determination of whether access to a particular government process is important in terms of that very process. *Id.* at 589.

Justice Stewart stressed the ability of a court to place reasonable time, place and manner restrictions on entry, based upon considerations of orderliness, the physical limitations of the courtroom, and to preserve such interests as trade secrets, or "the sensibilities of a youthful [rape] prosecution witness." *Id.* at 600 (Stewart, J., concurring).

Justice Blackmun found the "veritable potpourri" of constitutional sources relied upon by his brethren—"the speech clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and the penumbral guarantees recognized in past decisions"—to be "troublesome." *Id.* at 603 (Blackmun, J., concurring in part). He would rather settle the matter affirmatively by sole reliance upon the sixth amendment, thereby overruling the Court's earlier holding in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). 448 U.S. at 603 (Blackmun, J., concurring in part).

Justice White only added that he felt that this issue should have been dealt with in *Gannett*. *Id.* at 581 (White, J., concurring).

96. *Id.* at 577-78. The cases relied on by the Court include *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 519 (1939) (streets and sidewalks are traditionally open, and people may assemble for any lawful purpose in public places both to speak and to listen); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941) (these rights of assembly and speech may be subject to traditional time, place and manner restrictions).

97. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1985) ("[A] preliminary hearing may be closed only if specific findings are made demonstrating that first there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1983) (guarantees of openness in public trials extends to cover voir dire proceedings); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (compelling interest, such as protection of minor victim of sex crime, does not justify mandatory closure of courtroom; rather, state's interest may be secured by a case-by-case analysis of whether that interest warrants closure). But cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1983) (preventing access to and publication of information revealed in discovery process does not restrict traditionally public source of information and therefore does not abridge any first amendment right).

98. *Richmond Newspapers v. Virginia*, 448 U.S. at 581 n.18. According to the Court: "[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. . . . [A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable [time, place and manner] limitations on access to a trial." *Id.*; see also *Press-Enterprise Co. v. Superior Court*, 478 U.S. at 9 ("But even when a right of access attaches, it is not absolute."); *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 519 ("The fact that

Although a claim to a right of access regarding military operations thus would not be wholly revolutionary, it is by no means a sure thing. According to Chief Justice Burger's plurality opinion in *Richmond Newspapers*, three factors favored a first amendment right of access to criminal trials: (1) strong public need for information about criminal proceedings, a need closely linked to functions of democratic self-government; (2) a long tradition of openness; and (3) the lack of specific legislative findings establishing compelling governmental reasons for wholesale closure.⁹⁹ To establish a right of access in the military arena, the press would need to make a comparable showing. The press can, I believe, make a colorable showing on all three fronts; but, with the exception of the public need element, the arguments are weaker and more qualified than in *Richmond Newspapers*.

The reasons why there is a public need for information about warfare have already been canvassed.¹⁰⁰ The need is real and, if our collective experience during Operation Desert Storm is any gauge, pressing. Moreover, it is clear that this information bears directly on self-government. Our elected representatives in Congress declare war.¹⁰¹ Our elected President commands it.¹⁰² They are all accountable to us, the voters, for their military decisions. We cannot make judgments about their performance without an independent source of information regarding the wars they choose to conduct.¹⁰³

this [was] a First Amendment case does not, of course, mean that the public's right of access is unlimited"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608 n.20 ("[I]ndividualized determinations are *always* required before the right of access may be denied . . ."); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (protection to gather news does not extend to reporter's refusal to testify before grand jury under facts of that case); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it unrestrained right to gather information.").

99. 448 U.S. at 569-81.

100. For a discussion on the relationship between access to information, public debate and democratic government, see *supra* notes 16-19 and accompanying text.

101. "The Congress shall have the power . . . to declare war." U.S. CONST. art. I, § 8, cl. 11.

102. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States." U.S. CONST. art. II, § 2, cl. 1.

103. Because the military officials who carry out these directives and who plan, oversee and conduct the censorship are political appointees, they are not as readily accountable to the voting populace. Therefore, the presence of a checking and informing press can aid in curbing abuses of power or alert us to indiscretions perpetrated by those who are outside of the political process. Justice Jackson addressed this issue in his dissent to *Korematsu v. United States*, 323 U.S. 214 (1944):

There is also a history of press access to military operations. The government has permitted, and even invited, the press to be present in most situations involving armed conflict since the Civil War.¹⁰⁴ The government has also regularly briefed the press, disclosing significant data concerning war efforts. This traditional access, however, has always been qualified and subject to fairly strict governmental regulation. Military officials have always withheld some information on strategic grounds; the press has always been excluded from certain secret operations; and members of the press corps have always been subject to significant restraints on their movements within the theater of operations.¹⁰⁵ Thus, although a tradition of openness associated with military affairs exists to some extent, it lacks the breadth and consistency of the tradition of openness surrounding criminal trials, the importance of which was stressed by the Court in *Richmond Newspapers*.

Furthermore, although there are no specific legislative findings supporting the current Pentagon restraints on access,¹⁰⁶ the government can summon strong and fairly specific arguments for

If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

Id. at 248 (Jackson, J., dissenting).

104. For a discussion of the extent of press access during prior military conflicts, see Gottschalk, *supra* note 59 and accompanying text.

105. For further discussion of media access during military operations, see Cassell, *supra* note 59; Gottschalk, *supra* note 59; Homonoff, *The First Amendment and National Security: The Constitutionality of Press Censorship and Access Denial During Military Operations*, 17 N.Y.U.J. INT'L L. & POL. 369, 369-83 (1985).

106. Indeed, to the extent there are legislative "findings" on point, they seem to weigh more in favor of the press than the government. For example, as Justices Douglas observed in his concurrence in *New York Times*, the Espionage Act of 1950, in amending 18 U.S.C. § 793, states in § 1(b):

Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated having that effect.

403 U.S. 713, 722 (1971) (Douglas, J., concurring) (citing 64 Stat. 987).

Moreover, after the Grenada invasion in 1983, Congress passed a resolution declaring its view that the press should be guaranteed the ability to report on military ventures:

Since a free press is an essential feature of our democratic system of government and since currently in Lebanon, and traditionally in the past, the United States has allowed the press to cover conflicts involving United States armed forces, restrictions imposed upon the press in Grenada shall cease. For the purposes of this section, "restrictions" shall include:

the contention that in times of war it has compelling reasons for at least partially closing the gates of press access. There are, in any war, times when the need for speed or secrecy dictates exclusion of the press.¹⁰⁷ Information on military strategy, intelligence, tactical strength and deployment are all potentially extremely sensitive.¹⁰⁸ Given the long history of Supreme Court

(1) preventing the press from freely accessing news sources of its choice;

(2) unreasonably limiting the number or representation of the press permitted to enter Grenada; and

(3) unreasonably limiting freedom of unsupervised movement of the press in Grenada.

Provided, however, that nothing in their [sic] resolution shall be construed to require any action which jeopardizes the safety or security of U.S. or allied forces or citizen [sic] in Grenada.

129 CONG. REC. 29,946-47 (1983), *reprinted in* Cassell, *supra* note 59, at 944 n.101. Nothing further, however, came of this proposal.

In his *New York Times* concurrence, Justice Stewart commented on the issue of access *versus* censorship. He acknowledged that the Executive Branch did have the power to preserve national security by restricting access to government secrets. *New York Times*, 403 U.S. at 728 (Stewart, J., concurring). However, he warned that "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." *Id.* (Stewart, J., concurring). Accordingly, he cautioned that executive control over the disclosure of sensitive information required "judgment and wisdom of a high order." *Id.* at 729 (Stewart, J., concurring). He suggested:

[A] very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

Id. (Stewart, J., concurring).

107. For example, during World War II, there was no press present at the Battle of the Bulge, Midway, or the dropping of the bomb on Hiroshima. Cassell, *supra* note 59, at 939-42. During Vietnam, the press was likewise excluded from certain missions such as the rescue attempts at the Son Tay POW camps and the bombing raids into Cambodia and Laos. *Id.* There are, however, examples of open access to important events, such as the invasion of Iwo Jima and D-Day, and reporters in most cases had an almost unlimited amount of access during Vietnam. *Id.*

108. Throughout military history, "intelligence" and other matters of strategy and planning have been regarded as requiring extreme security. Although the modern age might view him as an extremist, Sun Tzu, the classical Chinese general, regarded the secret handling of delicate matters so essential that "if plans relating to secret operations were prematurely divulged the agent and all those to whom he spoke of them" would be put to death, so as to preserve the secrets. SUN TZU, *THE ART OF WAR*, 147 (1963). Modern strategists still regard "intelligence" to require security: "From the point of view of military command intelligence and communications are vital throughout the whole structure." H. ECCLES, *MILITARY CONCEPTS AND PHILOSOPHY* 193-94 (1965). Eccles also cau-

deference to the military,¹⁰⁹ there is considerable reason to believe that these arguments would receive a sympathetic hearing, especially in the current Court. While they do not justify *wholesale* exclusion of the press, they do suggest that perhaps generals should have more discretion to exclude members of the press from certain facets of warfare than trial judges should have to exclude the press from criminal proceedings.

Comparison with *Richmond Newspapers* thus yields, at most, a reasonably strong argument for only a *qualified* right of access to warfare information. To deny any right of access at all would be to permit the military, if it wished, to exclude the media entirely from wartime coverage. That would strike too severe a blow at self-government. To grant an expansive right of press access, however, could seriously jeopardize national security interests. Moreover, it would substantially enhance the government's claim that its only recourse to protect those interests would be a broad-based system of prior restraints. Extension of one first amendment right would paradoxically threaten retraction of another, more fundamental freedom.

It is perhaps curious, given the frequency with which we go

tions, however, that "true security can be jeopardized by the overclassification of nonessentials." *Id.* at 198.

109. See, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (government "can act to protect substantial interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment"); *Brown v. Glines*, 444 U.S. 348 (1980) (Air Force regulations requiring members of that service to obtain approval from their commanders before circulating petitions on Air Force bases upheld because of governmental interest in discipline); *Greer v. Spock*, 424 U.S. 828 (1976) (base commanding officer may restrict partisan political speeches and demonstrations which he perceives to clearly endanger loyalty, discipline or morale of troops under his command); *United States v. O'Brien*, 391 U.S. 367 (1967) (Congress may punish symbolic protest-burning of Selective Service registration card); *Schenck v. United States*, 249 U.S. 47 (1919) (Congress has power to punish distribution of circulars which encourage men called and accepted for military service to obstruct draft); see also *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (state tort law which would impose liability for design defects in military equipment is displaced where judgment against contractor would threaten discretionary function of government); *Rostker v. Goldberg*, 453 U.S. 57 (1988) (in deference to Congress's judgments, Court ruled that Military Selective Service Act's registration provisions do not violate fifth amendment by requiring only males to register for draft); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military regulation forbidding wearing of yarmulke is reasonable and even-handed in pursuing military's need for uniformity and does not violate first amendment); *Feres v. United States*, 340 U.S. 135 (1950) (United States is not liable under Federal Tort Claims Act for injuries to members of the armed forces sustained while on active duty and resulting from negligence of others in armed forces).

to war,¹¹⁰ that the issue of wartime press access has never been litigated to a final decision. This could be due, at least in part, to the somewhat surprising amount of government cooperation regarding press access during most prior military operations. As noted, during World War II, Korea and even Vietnam, the government was generally quite open with the press, both in its permission to reporters to be "on the scene," and in the data it disclosed during press briefings.¹¹¹

The government's attitude changed, however, after Vietnam.¹¹² Military policymakers were unprepared for the adverse public reaction that resulted when media reporting, for the first time, brought the graphic realities of wartime bloodshed into the living rooms of America. Since then, there appears to have been a reaction in the military against this historic policy of openness. Press complaints after Grenada prompted the Pentagon to conduct an internal study of the question of media access and to promise reforms. The result, known as the Sidle Report, proposed a "pool" system that would guarantee some press access yet give military officials the power to limit press involvement, especially in the early stages of an offensive action.¹¹³ This pool

110. During the twentieth century, the United States has been involved in five major conflicts, plus numerous minor military episodes. In the past decade alone, Americans have resorted to military force on at least five occasions: in Lebanon, Panama, Grenada, Libya and the Persian Gulf.

111. See Cassell, *supra* note 59, at 937-43 (discussion of military policy vis-à-vis the press during World War II, Korean War, Vietnam War).

112. For a discussion of the military's disenchantment with their policy on press access in wartime and the development of the "pool" system, see *supra* notes 65-72 and accompanying text.

113. In November of 1983, then-Chairman of the Joint Chiefs of Staff General Vessey, posed the question of how the military "could conduct military operations in a manner that safeguards the lives of our military and protects the security of the operation while keeping the American public informed through the media?" to a panel chaired by retired Major General Winant Sidle and comprised of military officers, representatives from journalism schools and retired journalists. Note, *supra* note 65, at 879 n.44. Their answer was the *Chairman of the Joint Chiefs of Staff Media-Military Relations Panel Report (Sidle Report)*. In the report, the panel provided eight recommendations:

- 1) Public affairs planning for military operations should be conducted concurrently with operational planning.
- 2) If pooling of reporters is necessary to ensure early access to an operation, plans should be made for the largest possible pooling procedure to be in place for the minimum time possible.
- 3) The Secretary of Defense should study whether to create a pre-established list of accredited correspondents in case of a military operation for which a pool is required.
- 4) The basic tenet governing media access to military operations should be voluntary compliance by the media with security guidelines or ground rules established and issued by the military.

system, with some further amendments adopted after the invasion of Panama, was essentially the one implemented during Operation Desert Storm.¹¹⁴ There was more press access in the Persian Gulf than in the two previous military escapades, but in contrast to other major military efforts like Korea and Vietnam, many seasoned veterans of the press corps expressed frustration at the restraints on access to which they were subjected.¹¹⁵

If the Court today were explicitly to acknowledge a right of

5) Public affairs planning for military operations should include sufficient equipment and qualified military personnel to help correspondents cover the operation.

6) Communications facilities should be made available to the media as soon as feasible, but these communications must not interfere with combat and combat support operations.

7) Intra- and inter-theatre transportation should be made available to the media.

8) Media-military understanding should be promoted by meeting and educational programs.

Cassell, *supra* note 59, at 946 (paraphrasing *Sidle Report*). For the complete text of this report, see Note, *supra* note 65, at app. I.

114. For the full text of the guidelines and ground rules used during Desert Storm, see *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1575-82 (S.D.N.Y. 1991) (apps. A-C, *Guidelines for News Media*; app. D, *Centcom Pool Membership and Operating Procedures*; and app. E, *Operation Desert Shield Ground Rules*) (these appendices include all subsequent changes in ground rules and regulations issued after the initiation of hostilities).

For Judge Sand's discussion of the history of these pool regulations, their subsequent modifications and the necessity of being in the pool to gain access, see *id.* at 1563-65.

115. Intent on avoiding the Desert Storm kind of pool system in any future coverage of a military conflict, representatives of 15 major news agencies sent a letter to Defense Secretary Cheney, criticizing the pool system and asserting that "the flow of information to the public was blocked, impeded or diminished." DeParle, *supra*, note 25, at A9, col. 1.

Surprisingly, after the war had concluded, General Schwarzkopf, Pete Williams, the chief spokesperson for the Pentagon, and White House Press Secretary Marlin Fitzwater admitted that the press pools were unsatisfactory and that the rules were "overly restrictive." *Id.* This does not necessarily mean, however, that the military has any plans of completely rejecting the pooling system. Indeed, Brigadier General Richard Neal of the Marine Corps believes that "the pooling system is here to stay." *Id.*

There is also at least some support in Congress for restrictive treatment of the press. Senator Lieberman commented that "restriction on news coverage was absolutely necessary in order to protect the lives of our troops, and in order to increase the odds of military success." Sheridan, *supra*, note 25, at 52. Others, like Representative Les Aspin, Chairman of the House Armed Services Committee, believe that it was only the particular circumstances of this war which allowed the pooling system to operate so effectively for as long as it did. *What Next? Second Thoughts on Restrictions*, N.Y. Times, May 6, 1991, at A9, col. 5. According to Representative Aspin, most of the original fighting was done in the air and most casualties occurred behind enemy lines, but if the war had been protracted or had large numbers of Coalition casualties, the pooling system would have collapsed. *Id.*

access during military operations in response to a press challenge to the military's current system, it seems clear that such a right inevitably should be subject to significant governmental regulation.¹¹⁶ The government should be permitted some latitude to limit the "time, place and manner" of access, and it should have some ability to control the content of required disclosure.¹¹⁷ The right of access, however, would be worth little unless the Court were careful to define the scope of these permitted regulations in fairly narrow and precise terms.¹¹⁸ The issue then becomes one of defining the type and scope of permissible regulation.

First, the military should be entitled to enforce reasonable "time, place and manner" restraints on the press. The Court, of course, has long recognized that restraints of this type do not offend the first amendment.¹¹⁹ The need for such regulations dur-

116. See *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1244 (1972) (detailed discussion of relationship between first amendment and national security interests).

117. For examples of permissible governmental time, place and manner restrictions, see *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (state may restrict use of school property for intended use so long as such restriction is not effort to suppress expression which is contrary to public officials' point of view); compare *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (airport's ban on all first amendment activities at central terminal held invalid on overbreadth grounds; restriction went further than regulation of expressive activity which might cause congestion problems or interference with airport activities). See also Matheson, *The Prosecutor, the Press and Free Speech*, 58 FORDHAM L. REV. 865 (1990) (discussing limitations on first amendment's protection of lawyers' extrajudicial speech); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 (examining status of individuals' right of access to non-mass communication channels and other types of fora); Kalven, *The Concept of Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965) (examining Supreme Court's shift in attitude towards protests and relationship to first amendment); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L.J. 135 (1983) (arguing that first amendment protects student-initiated religious speech in public secondary schools in same way that it protects speech in public universities).

118. The need for strict judicial limitation on the scope of permitted regulations is demonstrated by the view of senior Pentagon officials that press interests are subservient to military effectiveness. As Defense Secretary Dick Cheney put it: "Bottom line is you've got to accomplish your mission. You've got to do what it takes at the lowest possible cost in terms of American lives. And that takes precedence over how you deal with the press." *What Next? Second Thoughts on Restrictions*, *supra* note 115, at A9, col. 5. This attitude is understandable, perhaps even commendable, in view of the military's awesome responsibilities during wartime. But it is also a sure sign of the military tendency to over-regulate the press and under-value free speech in times of national emergency.

119. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1988) (city-issued guidelines for use of public bandshell valid as they did not infringe upon performers' content and were geared towards controlling noise); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (prohibiting soldier from wearing yarmulke when in uniform was not infringement of first amendment as Air Force guide-

ing wartime is apparent. As far back as the Civil War, reporters sometimes got in the way of troops and impeded military operations.¹²⁰ In the Persian Gulf, there were literally thousands of reporters from countless news organizations swarming around our forces. Their mere presence presented military officials with additional logistical factors to consider that, at best, were a nuisance, and, at worst, posed a significant risk to the efficiency and success of military operations.¹²¹ To prevent undue interference with military operations, military officials thus must exercise some power to direct the size, location and movements of the press corps.¹²²

lines on visible headgear were reasonably and evenhandedly applied in interest of uniformity); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (forcing company to allow opposing points of view on billing envelopes infringed on company's choice of what *not* to say); *United States v. Albertini*, 472 U.S. 675 (1985) (military base is not public forum; denial of entry onto base does not violate first amendment); *Heffron v. International Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640 (1981) (restriction on distribution, sales and solicitation to that done at fixed booths at state fair, where booths were rented in non-discriminatory manner, is permissible); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (city zoning ordinance restricting placement of adult theatres in interest of regulating commercial use of property did not infringe on protected communication); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (city ordinance prohibiting willful noisemaking or distractions near school during school hours did not impermissibly infringe on expressive activity); *Adderly v. Florida*, 385 U.S. 39 (1966) (state anti-trespass statute aimed only at malicious or intentionally mischievous trespass activity, as applied to demonstrators on county-jail property not open to public, not unconstitutional); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (restrictions on use of "loud and raucous" sound truck not unconstitutionally vague); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (state may constitutionally require and charge for license for parade or procession on public street).

120. See Cassell, *supra* note 59, at 933-35 (discussion of press-military interaction during wartime from Revolutionary War to Civil War).

121. According to Colonel Bill Mulvey, the JIB director in Dhahran: "Having reporters running around [the front] would overwhelm the battlefield." Zoglin, *Volleys on the Information Front*, *supra* note 23, at 45.

122. The pooling system in force during Operation Desert Storm was based on a version of the earlier *Sidle Report*. During Operation Desert Storm, participation in the pool system was limited to "media that principally serve the American public and that have had a long-term presence covering Department of Defense military operations." *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1564 (S.D.N.Y. 1991). Pools were of two types: eighteen-man for ground combat operations; and seven-man pools for ground combat "and other coverage." *Id.* at 1565. Once selected for a pool, media members were required to then register with the JIB, which then assigned escorts who accompanied and directed the pools to pre-approved sites. *Id.* For the full text of the guidelines, see *id.* at appendices A-E.

Without a doubt, some regulations are necessary—not only to protect military interests, but also to safeguard the press from the enemy. The capture of CBS correspondent Bob Simon, after he broke from the pool system, serves as a prime example of how the military guidelines were in fact helpful in protecting

Even at the level of time, place and manner restraints, however, there must be some limits on discretion. The Grenada affair demonstrates the risk of overbreadth—surely *total* exclusion of the press from the Grenada assault was unjustified. Management of the press pools in the Persian Gulf also hints at the possible hidden dangers of content-oriented bias in an apparently neutral time, place or manner restraint. According to the lawsuits that were filed, the military in the Persian Gulf gave preference to “establishment” news organizations over the “alternative” press.¹²³ This preference—perhaps not so coincidentally—tended to cut off access for reporters who represented some of the news organizations that were most critical of the war effort. Whether the result was intended or not, some reporters felt this was further evidence that the press pools were being manipulated to guarantee favorable accounts of the war.¹²⁴

Second, a right of access necessarily would be subject to some government control over the content of information disclosed. There is undoubtedly much that military officials could disclose about their activities without jeopardizing operations.¹²⁵

our media. Zoglin, *Jumping Out of the Pool*, *supra* note 26, at 39 (brief account of disappearance and capture of Bob Simon).

123. The guidelines permitted only major television networks, radio networks “that served a general listening audience,” major wire services, major national newsmagazines “that serve a general news function,” and major newspapers “that have made a commitment since the early stages of Operation Desert Shield to cover U.S. military activities in Saudi Arabia and have had a continuous or near-continuous presence . . . since the early stages of the operation.” *Nation Magazine*, 762 F. Supp. at 1578-79 (Appendix D). Thus, any publication that did not fit into the military’s definition of “major” could not be a part of any pool. The military, however, never issued a standard by which “major” was measured (e.g., “any publication with circulation over one million”). Exclusion from these pools inevitably carried a bias against publications advocating minority viewpoints on the war.

124. Some members of the press complained: “[T]he most important power the military exercised was the decision over where to send the pools. . . . [This] turned officers into assignment editors, determining story lines by dictating what reporters could see.” DeParle, *supra* note 25, at A9, col. 1; *see also* Wicker, “Marketing” the War, *N.Y. Times*, May 8, 1991, at A23, col. 5 (veteran reporter complained that “the government succeeded . . . in censorship by access and delay”; “the military did not have to ‘manufacture’ news to control information going out to Americans at home”).

125. Information that could be disclosed includes both information that lacks strategic significance *and* information that, though strategically important, is probably already known by the enemy. For first amendment purposes, access to the latter category is probably more important, because strategically relevant information contributes more to the process of self-government. The challenge is to evaluate very carefully objective evidence bearing on the question of whether the enemy already knows the information in question.

Walter Cronkite told an anecdote of being censored from publishing a story about the Allies successfully bombing Germany through heavy cloud cover.

There is, however, some data that, in any kind of warfare, must be secret. The most ardent supporters of "government in the sunshine"—broad public access to governmental affairs—would, I trust, exempt the wartime military from at least the harshest rays of public scrutiny. In Operation Desert Storm, for example, even our most forthright military officials repeatedly had to refuse on strategic grounds to answer some of the more probing questions at press briefings.¹²⁶ We would not want to force General Schwarzkopf to announce his strategy on public television or defend his decision to make a "surprise" attack in a press conference held a day before the beginning of the assault. It would be an absurdity to think that war could be conducted on those terms.¹²⁷

Yet, this form of control would have to be even more carefully defined than the time, place and manner restraints discussed above. Content-based restraints are generally disfavored under the first amendment.¹²⁸ Like prior restraints, content-based re-

Cronkite, *supra* note 32, at 43. He was not permitted to send the story until he pointed out that the Germans on the ground already knew that we possessed such capabilities. *Id.* "The truth was not being withheld from the Germans, but Americans." *Id.* Likewise, it would not have made sense if the JIB had censored a story on our ability to drop a bomb down a smokestack, for the Iraqis, if anybody, would know in no uncertain terms that we could do that. For a discussion of the function of the JIB, see *Nation Magazine*, 762 F. Supp. at 1565.

126. A typical response to questions of this nature ran along the lines of "[I]f we tell—tell you that we're telling Saddam Hussein that . . . So we don't want to go into it any more deeply than I have." *Defense Dep't Regular Briefing*, Federal News Service, Feb. 20, 1991 (LEXIS, Nexis library, FEDNEW file) (quoting Lt. General Thomas Kelly).

Richard Solant, former president of CBS News, defended the press's role in the briefing process, though recognizing that, by asking "often contentious, sometimes impolite questions," the press can look like "bullies." Zoglin, *Just Whose Side Are They On*, TIME, Feb. 25, 1991, at 53. According to Solant: "People don't understand that briefings are a negotiation process." *Id.*

127. It is an equal absurdity, however, to imagine a press "briefing" in which no information of military significance is disclosed. As Chief Justice Burger said: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1981).

Operation Desert Storm occasionally brought us a bit too close to that absurdity for comfort. On one occasion, for example, General Colin Powell, Chairman of the Joint Chiefs of Staff, held a press conference in which he purported to demonstrate the decline in Iraqi radar activity resulting from Coalition bombing. Zoglin, *Volleys on the Information Front*, *supra*, note 23 at 44. He used charts that were supposed to show the decline, but all the numbers had been removed. *Id.* He then deflected questions seeking more specifics by saying "Trust me." *Id.* In effect, the only support at this and other similar briefings for the Pentagon's assertion that the bombing raids had been successful was the Pentagon's assertion that the bombing raids had been successful.

128. See, e.g., *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990) ("[I]f

strictions allow the government too much power to control the flow of public opinion.¹²⁹ Thus, although the sensitivity of military operations dictates a need for substantial military discretion over the content of disclosures, some limit on content-based access restraints would be essential. Otherwise, the “exceptions” to the right of access we are contemplating would be so broad that they could effectively swallow the rule.

One problem the courts would have to face in crafting the scope of these qualifications is the problem of mootness. In warfare events often move swiftly and the moment when access is needed is quickly gone.¹³⁰ In view of these difficulties, courts should, I believe, recognize that claims of access are of the type known as “capable of repetition yet evading review”¹³¹ for which the strict requirement of an immediate “live controversy” should be relaxed.¹³² Our nation’s history sadly teaches us that military attacks and reprisals are steadily recurring events, that the issues of press access possess common attributes in war after war, and

there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Virginia Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976) (prohibiting advertising of drug prices was held unconstitutional because state’s goal was achieved “by keeping people in ignorance”).

129. “Any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.’” *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

130. The dismissal of *Flynt v. Weinberger*, 762 F.2d 134 (D.C. Cir. 1985), was predicated on this very point. The “war” in Grenada ran its full course in just under two months, the absolute press ban occupying only the first two days (the period in which American forces crushed whatever resistance Grenada ground forces had been able to muster), and the last month (at which time American forces had total control of the island) being completely free of any restrictions. Thus, when the suit came before the federal court one and a half years later, the court ruled that the issues were no longer “live” and dismissed the claims for both declarative and injunctive relief. *Id.* at 135.

131. *Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911).

132. *Compare* *Flynt v. Weinberger*, 762 F.2d 134 (D.C. Cir. 1985) (court concluded case was moot due to swift completion of war) *with* *Nation Magazine v. United States Dep’t of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991) (even though fighting had stopped, Court recognized issue before it as capable of repetition; case dismissed on other grounds). *See also* *Sosna v. Iowa*, 419 U.S. 393 (1975) (acceptance of “second-best” plaintiff for issue at hand; question of degree of controversy); *Roe v. Wade*, 410 U.S. 113 (1973) (same); *Meese v. Keene*, 481 U.S. 465 (1987) (relaxing question of attenuation of injury; question of concreteness of controversy); *Kolender v. Lawson*, 461 U.S. 352 (1983) (same). For a general discussion of the concept of mootness, see Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1989-90); Greenstein, *Mootness in Class Actions*, 35 STAN. L. REV. 897 (1982-83).

that the same parties will be subject to military restraints on access in each succeeding conflict.

Nor should courts follow the ruling in *Nation Magazine* that the issues at stake are too "abstract" to be decided by an article III court.¹³³ To be sure, some of the specifics of time, place, manner and content restraints must be resolved in the context of a particular military operation. The obligation of the government itself to guarantee a qualified right of access, however, has yet to be decided. That issue is no less real and no more abstract than the obligation of a trial judge to let the press into a courtroom to observe a criminal trial. That issue has persisted now through at least three military conflicts, and there is, in the history of those episodes and the wars that preceded them, ample evidence from which a court could make an informed judgment about the overarching constitutional question.¹³⁴

The complaints in *Nation Magazine* focused more sharply on these issues of access than they did on questions of censorship. I think, however, that the case was originally brought because some members of the press believed that a promise of access, which historically had been the quid pro quo for voluntary submission to censorship,¹³⁵ had been substantially breached by the military's stingy approach to access in the Persian Gulf. This feeling was particularly acute among reporters who were not part of the press establishment, who felt that the "pool" system discriminated against them in favor of larger news organizations that maintained cozy relations with the Pentagon.¹³⁶ They believed that

133. Judge Sand concluded:

[T]his Court cannot now determine that some limitation on the number of journalists granted access to a battlefield in the *next* overseas military operation may not be a reasonable time, place, and manner restriction, valid under the First and Fifth Amendments. Since we find the issues as here presented to be too abstract and conjectural for judicial resolution the Court, on this ground, grants Department of Defense's motion to dismiss the complaint.

Nation Magazine, 762 F. Supp. at 1562.

134. See Cassell, *supra* note 59, at 969-73 (discussion of trade-off between censorship and access).

135. For a discussion of the historical "access for censorship bargain," see *supra* notes 59-63 and accompanying text.

136. Because they were not classified as "major" media and had not been in Saudi Arabia from the start of hostilities, The Nation Magazine, Harper's Magazine, In These Times, Pacific News Service, The Guardian, The Progressive, Mother Jones, The L.A. Weekly, The Village Voice, The Texas Observer, Pacifica Radio News, Sydney H. Schanberg, E.L. Doctorow, William Styron, Michael Klare and Scott Armstrong were excluded from the pools as per the JIB's guidelines. *Nation Magazine*, 762 F. Supp. at 1558. Once rejected, they brought suit against the Department of Defense. *Id.*

the government had failed to live up to its part of an implicit bargain.

As noted before, legal action against the pool system went nowhere because the ground offensive was over so shortly after it was begun. It is fair to say, however, that many members of the press at least feel that the era of press-military cooperation is coming to an end. Unless the military relaxes its policies on access, or unless Congress intervenes to specify more open rules for press access during military ventures, the next military undertaking seems sure to bring with it another constitutional challenge.

IV. CONCLUSION

What is curious about this battle between the press and the military is that each side seems to want something it is not clearly entitled to under the Constitution. The military wants censorship that is anathema to first amendment values.¹³⁷ The press wants a right of access that lacks a solid first amendment pedigree.¹³⁸ In "go for broke" constitutional litigation, both sides stand to lose an important privilege they have long enjoyed.

Nor is it immediately clear that constitutional analysis can replicate the historic press-military "bargain." To do so, the Court would have to hold that broad access with broad censorship is a "less restrictive alternative" to no access with very limited censorship. That conclusion is not indefensible, but it is also by no means intuitively obvious. Indeed, it turns the traditional belief that controlled disclosure is less restrictive than direct press regulation on its head.¹³⁹ What is functionally less restrictive is theoretically more so and vice versa. The traditional values of the first amendment, in this particular context, yield a paradox.

When, in other areas of law, precedent is uncertain or nonexistent, current principles seem to yield functionally undesirable results, stakes are extremely high, and the need for a dependable solution is great, the alternatives to judicial resolution of a con-

137. For a discussion of the military's attempts to censor certain information during Operation Desert Storm, see *supra* notes 25-28 & 65-70 and accompanying text.

138. For a discussion of the constitutional foundations upon which the press had based its claim of a right of access to cover wartime events, see *supra* notes 80-83 and accompanying text.

139. For a discussion of the Court's constitutional concerns in the "controlled disclosure" context in *Florida Star v. B.J.F.*, 488 U.S. 887 (1989), see *supra* notes 78-79 and accompanying text.

troversty tend to grow in their appeal.¹⁴⁰ This is the kind of situation in which a seasoned litigator might well recommend to his client (on either side) that the parties meet at the bargaining table, "get to yes"¹⁴¹ and reach an out-of-court settlement. Indeed, the judicial "decisions not to decide" in *Flynt* and *Nation Magazine* may well contain as an unwritten subtext the suggestion that the press and the Pentagon would be much better off resolving their differences out of court. This is not to say that the courts lack the power to resolve the dispute. Nor is it to say that there is not an answer under the first amendment. Rather, it betokens the recognition, repeatedly voiced by the dissenters in *New York Times*, that "great cases" can make "bad law," a warning prudent actors in this on-going drama would be well advised to heed.¹⁴²

In the wake of Operation Desert Storm, it seems fair to assert that our nation has seldom been more secure. Military success has brought with it supreme public confidence in our ability to protect American interests in the international arena.¹⁴³ The war's portent for our domestic civil liberties, however, is less certain. The sharp conflict between the press and the Pentagon over rights of the press during wartime is unlikely to vanish like a mirage on the sands of the Arabian desert. Unless there is a significant change of position on either or both sides of this dispute, the Court may be forced to resolve it in our next military episode. If forced to do so, I think it is safe to say that the Court will find the commands of the first amendment in this particular area anything but easy to apply.

140. See generally *A.D.R.: An Innovative Approach to Solving Problems Efficiently*, 51 TEX. BAR J. No. 12 (1988) (special issue on Alternative Dispute Resolution).

141. See R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (manual on advantages of and tactics for negotiated settlement).

142. *New York Times Co. v. United States*, 403 U.S. 713, 752 (Harlan, J., dissenting); *id.* at 759 (Blackmun, J., dissenting).

143. President Bush, upon the Allies' definitive defeat of the Iraqi forces, proclaimed: "Well, it's a proud day for America and by God we've kicked the Vietnam Syndrome once and for all." *World News Tonight With Peter Jennings* (ABC television broadcast, Mar. 1, 1991) (LEXIS, Nexis library, ABCNEW file) (referring to the belief that any large-scale American military intervention abroad was doomed to a drawn-out and embarrassing defeat).

There are, however, those who are now wary of an Iraqi Syndrome—the belief that the revitalized American war machine is invincible and should serve as a world-wide super-cop against any aggressions. Rep. John Lewis (D. Ga.) put it pithily: "I hope we don't get used to war being so easy. War is not a cure-all." Dionne, *Vietnam Syndrome*, *supra* note 88, at A1, col. 1.